COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC FAR-

APPEALS COURT NO. 21-P-158

MARK A. ADAMS,

Plaintiff-Appellant,

v.

SCHNEIDER ELECTRIC USA,

Defendant-Appellee.

APPELLEE'S APPLICATION FOR FURTHER APPELLATE REVIEW

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Dated: September 7, 2022

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Defendant-Appellee Schneider Electric USA ("Schneider") respectfully requests that this Court grant leave for further appellate review of the Appeals Court Order dated August 17, 2022 ("Order"). That Order narrowly reversed the Superior Court's decision ("Decision") dated December 16, 2020 (White, J.) granting summary judgment to Schneider on all counts.[1] The Appeals Court was split 3-2, with two of three justices who appeared at oral argument filing a 17-page dissent ("Dissent"). As discussed herein, this Court should grant further appellate review for substantial reasons affecting the public interest and the interests of justice.

First, the Appeals Court committed serious error in holding that courts cannot consider unrebutted sworn testimony and evidence offered by the moving party at the summary judgment stage. As the dissent recognized, were this the rule, summary judgment would rarely if ever be available to a defendant. Based on this erroneous holding, the Appeals Court disregarded crucial unrebutted testimony that the decision-maker who selected Plaintiff-Appellant Mark Adams ("Adams") for the reduction-in-force ("RIF") did so for business reasons having nothing to do with age, and other unrebutted evidence that fatally undermined his age discrimination claim.

[1] Copies of the Decision and the Order are attached hereto as an Addendum p. 30 and p. 45, respectively. Citations to the Record Appendix appear as "RA _."

Second, the Appeals Court misapplied the stray remarks doctrine that is a bedrock of Massachusetts employment law. The Court focused on a few stray remarks, culled from Schneider's 9,000-page document production, that were not at all probative of pretext, and on this basis declared a material dispute of fact. The majority's misapplication of the stray remarks doctrine was so significant that it forced the dissent to caution that the doctrine is "firmly embedded in Massachusetts law," and "it should be for the Supreme Judicial Court, not [the Appeals Court], to retire it." Dissent 7 n.7. In gutting the stray remarks doctrine, the majority also introduced a novel and expansive interpretation of "cat's paw" liability that conflicts with SJC precedent, and was not timely raised by Appellant or briefed by the parties.

The majority's approach to the stray remarks also creates negative public policy consequences. The stray remarks here are not only irrelevant to pretext, but they concern legitimate succession planning, diversity programs, and a partnership with a university graduate program to recruit candidates (of all ages) with high-tech skills and to train its existing workforce. The practical effect of the Court's erroneous treatment of such remarks is to threaten businesses' legitimate succession planning, diversity initiatives, and hiring programs, contrary to sound public policy.

Third, the Court erred in its consideration of Adams' statistical evidence, and unreliable expert analysis, neither of which show pretext for age discrimination. As the dissent recognized, when the undisputed statistical evidence is properly

considered, it belies any claim of age discrimination. *Both parties*' experts agree that there was no statistically significant disparity among those selected or not selected for the RIF, when analyzing the group of employees aged 40 and older—the proper focus of an age discrimination case.

Fourth, the majority also erred in suggesting that there is a new affirmative obligation for employers exhaustively to seek alternative employment for older workers prior to conducting any RIF. There is no such requirement in the law, and to add one would be unworkable for Massachusetts employers.

II. STATEMENT OF PRIOR PROCEEDINGS

Adams originally brought six counts arising out of his selection for a 2017 RIF: age discrimination; "knowing" age discrimination; "pattern and practice" discrimination; "disparate impact" discrimination; aiding and abetting discrimination against three individual defendants, Mirza Beg ("Beg"), Michelle Gautreau ("Gautreau"), and Amanda Arria ("Arria"); and wrongful termination in violation of public policy, claiming he was chosen for the RIF because he made certain statements about batteries. Joint Record Appendix ("RA") 27-28.

On January 27, 2020, the parties filed a Stipulation of Dismissal With Prejudice, dismissing Beg and Gautreau as defendants. RA 22. On February 21, 2020, Schneider filed a Motion for Summary Judgment on all counts. RA 22.

On December 16, 2020, the Superior Court (White, J.) entered summary judgment for Schneider and the sole individual defendant, Arria, on all counts. RA 23-24.

On January 11, 2021, Adams filed his Notice of Appeal. On appeal, he abandoned all counts except Count I, for disparate treatment age discrimination against Schneider. Order 2 n.2.

The Appeals Court heard oral argument on December 14, 2021, and issued its Order reversing summary judgment on August 17, 2022. The Order noted that argument was heard by a three-judge panel consisting of Justices Meade, Henry and Singh. *Id.* 1 n.1. After circulation of a majority and dissenting opinion, the panel was expanded to include Chief Justice Green and Justice Rubin. *Id.* The ultimate decision was 3-2; Justices Meade and Singh filed a 17-page dissent. Rather than file a petition for rehearing with the divided Appeals Court, Schneider seeks further appellate review in this Court.

III. STATEMENT OF FACTS RELEVANT TO THE APPEAL

A. Colby, Director of Engineering in R&D, Was Tasked With Reducing R&D Budget

In November 2016, Ken Colby ("Colby") became Director of Engineering for HBN R&D. RA 196, 600-02, 619, 634. Colby oversaw 45 employees, and was in charge of making hiring and termination decisions within that department. RA 133, 144-45. In his new role, Colby was responsible for managing HBN's R&D projects

within a specific budget. RA 602. He reported to Jim Munley, VP of the Project Management Office, who reported to Pankaj Sharma ("Sharma"), Senior VP of Engineering. RA 603, 609, 614, 618, 634.

In December 2016, Sharma told Colby that the business had been flat or negative, and Colby would need to reduce the R&D budget by 22% year over year, or €1.715 million. RA 319-20, 609, 614-15, 618, 642-43.[2] Sharma did not tell Colby how to reduce costs, and did not instruct Colby to reduce headcount. RA 615.

Colby took several initial steps to reduce costs, but realized he would need to implement a RIF to meet his budget. RA 219-20, 615, 627, 647. No one instructed him on whom to select for the RIF:

> **Q: Okay. So did you have any direction as to who to select?**
>
> **A: No direction as to who to select, no.**
>
> **Q. None whatsoever[?]**
>
> **A: No.**

RA 609; *see also* RA 198, 200, 202, 213-14, 616, 621-22, 662-63. Others echoed this undisputed fact. Arria, an HR VP, testified, "Ken Colby directly made those decisions for his organization." RA 200. She testified, "I was made aware of who was impacted, but I wasn't at all involved in the process." RA 202.

[2] Sharma and the Finance Department subsequently provided a revised number by which Colby needed to reduce his budget. RA 622.

Aside from its EEO policies, and compliance with the Older Workers Benefit Protection Act, Schneider has no policy or practice regarding how to select employees for RIFs. RA 169-182, 210, 212, 242, 652.

B. Colby's Selection Criteria for the RIF

Colby considered three factors in making selections for the RIF. RA 621, 623. First, he determined who on his team spent the majority of their time supporting projects outside of R&D. RA 647. Next, Colby determined whose selection in the RIF from his team would have the least impact on the R&D group's projects and goals. RA 623-24, 647. Finally, Colby looked into the possibility of consolidating managers, and he selected one manager for the RIF. RA 623, 647.

C. Colby Made His Selections for the RIF Based on the Selection Criteria

To organize the selection process, Colby prepared a ranking spreadsheet with the "Pros[,]" "Cons[,]" and "Impact" of selecting certain employees for the RIF. RA 188-89, 624, 645. To assess his employees' criticality, Colby grouped each of his employees by job "Function," which represented the general category of work each employee performed. RA 188-89, 215-16, 242, 289-92, 296-97, 623-24.

Colby removed from consideration certain R&D subject matter experts and those he knew were critical to R&D projects. RA 298, 624, 647. He knew, for example, that roughly 30 to 35 of his employees were subject matter experts in specific areas and tied to key R&D projects, or spent all of their time in R&D, and

thus were critical to R&D. *Id.* Next to Adams' name on the spreadsheet, under "Comments," Colby wrote: "Can Mark be moved to [Field Quality Engineering]?" RA 188-89, 645.

D. Colby Looked for Other Positions for Adams Before Finalizing the RIF List

Colby and Adams have known each other since 1998, and consider each other friends. RA 326, 575, 606. Before finalizing the RIF list in January 2017, Colby twice met with Kabai, the Director of Field Quality Engineering who oversaw Adams' work on the Battery Quality Initiative, to try to find a position for Adams and spare him from the RIF. RA 234, 606, 613. Kabai informed Colby that he did not have the headcount to bring Adams onto his team. RA 226, 234-35, 326, 609.

E. Colby Selected Eight Employees for the RIF

To meet budget requirements, Colby selected individuals ranked 1-8 on his spreadsheet to be terminated in the RIF. RA 188-89, 644. This included the manager, Adams, and six other employees. RA 183-86, 639.

Colby chose Adams because Adams spent most of his time working on projects outside of R&D, so his selection would have less detrimental impact on R&D projects. RA 646, 662-63. Colby received no instruction from anyone else when selecting Adams for termination. RA 198, 609, 648. He did not consider anyone's age in the selection process, and did not receive any instruction to consider age as a factor. RA 240, 640, 663.

F. Colby Notified Others of His RIF Selections

After Colby determined his final RIF selections, he sent the list to his managers, and the Finance and HR departments, to keep everyone informed. RA 217-18, 628. HR acted only in a support role, and did not suggest names for the RIF, or have any other decision-making input into the selections. RA 192-93, 201-02, 215, 221-22, 623, 628.

G. Colby Notified Adams of His Separation

Upon Adams' termination, Schneider offered him a severance package, attached to which, as required by law, was: (1) a list of the ages and job titles of HBN employees who were terminated in the January 2017 RIF ("Attachment A"); and (2) a list of the ages and job titles of HBN employees who were not terminated ("Attachment B") ("OWBPA List"). RA 183-86, 212, 241, 332-33, 577, 639.

Of the 65 individuals from HBN that were not selected for separation, only 36 fell under Colby's chain of command.[3] RA 183-86, 241, 640-41. Colby had no decision-making authority over employees outside of his department. RA 241, 619.

[3] Colby is listed on Attachment B as "US-DIR ENGINEERING," and is the 37th person listed from HBN US R&D. RA 241.

H. Adams Admits Colby Possessed No Discriminatory Animus

Adams does not allege that Colby had any discriminatory animus toward him; in fact, he believes Colby took steps to prevent having to terminate his employment. RA 27-28, 335, 575, 580.

I. Post-RIF, Many Retained Employees Were the Same Age or Older than Adams

After the RIF, of the 65 retained individuals in all of HBN, excluding Colby, 17 were the same age as or older than Adams, and 31 were over age 50. RA 183-186, 241, 244-46. After the RIF, of the 36 retained individuals within Colby's HBN R&D group, excluding Colby, 12 were older than Adams, and 16 were over age 50. RA 244-46. Of the 10 people in Colby's group in the same "Function" as Adams who were retained after the RIF, three were older than Adams, four were over age 50, and all but one was over age 45. RA 242, 244-46.

J. None of the Retained Employees Worked in Adams' Position

None of the employees retained after Adams' termination worked in the same position as Adams, performed the same job duties, or worked on the Battery Quality Initiative. RA 241-42, 577. One other Electrical Engineer was retained after the RIF, but did not perform the same job function as Adams, and was four years older than Adams. RA 241.

The "Senior" and "Staff" electrical engineer positions reflected on Attachment B of the severance letter, and their corresponding responsibilities and

assignments, were not the same as the Electrical Engineer position held by Adams. RA 241, 244-46. "Senior" and "Staff" electrical engineer positions were dedicated to supporting Product Development or Production Evolution within the HBN R&D team. *Id.*

K. Schneider Did Not Replace Adams After the RIF

Schneider did not replace Adams after his termination. RA 223, 226, 241-42, 580, 663. No other members of the HBN US R&D team have worked in the same position as Adams since his termination. RA 241-42. Adams' former manager Fred Rodenhiser took on some of the work, and the work was otherwise spread throughout the Company. RA 226. Adams never applied for any other position at Schneider. RA 579.

L. Adams' Expert Fails to Show That the January 2017 RIF Had Any Age-Based Disparate Effect

On December 13, 2019, Adams served his Expert Disclosure, containing a "Statistical Report" prepared by Dr. Craig L. Moore, dated June 19, 2018. RA 256-80. In his Report, Dr. Moore concluded that "employees . . . were selected under a common RIF procedure[.]" RA 262. In support of this conclusion, Dr. Moore cited to: (1) the OWBPA List; and (2) Colby's "notes and comments" about his employees' "strengths and weaknesses[.]" RA 188-89, 262. Dr. Moore determined that disparate effect did not take place "between those younger than 40 and those older than 40, but within the protected age class." RA 264. Instead, Dr. Moore claims

"the disparate impact on employees who were terminated fell on those 50 and older." *Id.*

On January 21, 2020, Schneider served its Expert Disclosure, containing the Report of Ali Saad, Ph.D., dated January 20, 2020. RA 281-313. Dr. Saad agreed with Dr. Moore that there was no statistically significant disparity when analyzing the group of employees aged 40 and older. RA 290, 295-96.

In conducting his analysis, Dr. Saad determined that: (1) Colby used a unique RIF-selection process that applied only to HBN R&D employees; (2) Colby could only select from a group of 43 employees; and (3) Colby considered employees' criticality and job "Function" in the RIF-selection process. RA 290-93. As a result, Dr. Saad determined that a proper statistical analysis should be restricted to employees who reported in Colby's chain of command. *Id.* When controlling for job "Function," Dr. Saad's analysis revealed that there was no statistical disparity with respect to employees age 50 and older in the January 2017 RIF. RA 290-91, 296-99.

IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

Further appellate review should be granted for substantial reasons affecting the public interest or the interests of justice. M.G.L. c. 211A, § 11; Mass. R. App. P. 27.1. Further appellate review has been granted when: (i) the Appeals Court misinterpreted or disregarded precedent; (ii) the appeal involves an issue of first impression or to reconcile conflicting precedents; (iii) review is necessary to modify

a legal standard that the Appeals Court adopted or the SJC previously established; (iv) the appeal involves a significant procedural issue or issue of statutory interpretation; or to (v) address negative public policy implications of a decision.[4] The majority opinion meets each of these criteria; the 17-page dissent recognizes the gravity of the majority's errors.

First, the majority erred in holding that courts cannot consider unrebutted evidence offered by a moving party at summary judgment. This misconstrues precedent and Rule 56, and creates significant procedural issues that urgently warrant the Court's attention. In applying its erroneous standard, the majority ignored uncontroverted evidence that is dispositive of Adams' claim.

Second, the majority misinterpreted the stray remarks doctrine, a bedrock of Massachusetts employment law. In doing so, the Court introduced a novel and over-expansive interpretation of "cat's paw" theory. The dissent expressed concern that the majority was "tak[ing] issue" with the stray remarks doctrine, and cautioned that only the SJC could determine whether to retire it. Dissent 7 n.7. The majority's treatment of the stray remarks has negative public policy effects, as it threatens businesses' legitimate succession planning, diversity initiatives, and hiring programs.

[4] Practical Law Litigation, *Massachusetts Appeals: Dispositions and Post-Decision Procedures*, Westlaw W-024-0314 (2022) (collecting cases).

Third, the Court erred in its consideration of Adams' statistical evidence, and unreliable expert evidence, neither of which establishes pretext. This error has broad implications for employment cases, and runs afoul of SJC precedent.

Fourth, the majority opinion creates legally unfounded obligations on employers by requiring that they exhaustively seek alternate employment for all older workers before selecting them in a RIF. That holding creates unsound public policy, and creates an unworkable obligation for the Commonwealth's employers.

V. WHY FURTHER APPELLATE REVIEW IS WARRANTED

A. The Appeals Court Erred in Ruling That It Could Not Consider Undisputed Evidence Presented by the Moving Party on Summary Judgment.

The majority erroneously declared that it was required to "disregard" unrebutted evidence presented by Schneider at summary judgment. Order 27-28. Applying this new standard, the majority ignored critical undisputed facts that are dispositive of Adams' claim.[5] This is wrong.

As the dissent recognized, "[i]n determining whether a genuine issue of material fact exists on this record, a reviewing court is not required to disregard all evidence favorable to Schneider, including Colby's unimpeached deposition testimony, and the documentary evidence produced from the time of the January

[5] For instance, the majority ignored undisputed facts that Colby was the sole decision-maker, harbored no animus, and applied neutral selection criteria. (*Supra* Sec. III(A-H).)

2017 RIF. If that were the rule, summary judgment would rarely, if ever, be available to a defendant." Dissent 2 n.4; *see Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group*, 469 Mass. 800, 804-05 (2014) ("adverse party … must set forth specific facts [in its affidavits and pleadings] showing that there is a genuine issue for trial").

The dissent also recognized the majority's misplaced reliance on *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000). The dissent correctly noted that this Court has not adopted the majority's reading of *Reeves*, and the First Circuit has rejected it. Dissent 2 n.4; *see LaFrenier v. Kinirey*, 550 F.3d 166, 168 (1st Cir. 2008) (plaintiff interpreted *Reeves* as "precluding summary judgment where the movant relies on the testimony of interested witnesses. We have rejected that reading of *Reeves* in this circuit."); *Dennis v. Osram Sylvania, Inc.*, 549 F.3d 851, 856 (1st Cir. 2008) ("[Plaintiff] misreads the scope of *Reeves*. At summary judgment we need not exclude all interested testimony, specifically testimony that is uncontradicted by the nonmovant."); *Ronda-Perez v. Banco Bilbao Vizcaya Argentaria-P.R.*, 404 F.3d 42, 45-46 (1st Cir. 2005) (rejecting summary judgment argument that witnesses connected with defendant should be "deemed unworthy of belief").

A recent Appeals Court decision similarly rejected the majority's interpretation of *Reeves*, finding that such a reading "is directly contradicted by well-established Massachusetts precedent[,]" and noting that federal courts of appeals

(First, Third, Fourth, and Sixth Circuits) addressing the majority's interpretation have "soundly rejected it." *Campos v. Massachusetts Bay Transportation Auth.*, 93 Mass. App. Ct. 1118 n.6 (2018) (R. 1:28) (citations omitted).

Under Rule 56, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It may do so by submitting unrebutted testimony or evidence into the summary judgment record. As the dissent noted, a "potential disbelief" by the jury of unrebutted testimony is not a "specific fact" under Rule 56. Dissent 7-8. The majority's error on this significant procedural issue itself warrants further appellate review. It is critical that the SJC reverse the majority's holding.

B. The Appeals Court Misapplied the Stray Remarks Doctrine, Creating Bad Public Policy.

As the dissent recognized, "the stray remarks doctrine" is "firmly embedded in Massachusetts law[.]" *Id.* 7 n.7 (collecting cases). The majority veered so far afield from that doctrine that the dissent cautioned: "it should be for the Supreme Judicial Court, not the Appeals Court, to retire it." *Id.*

It is undisputed that Colby alone made RIF selections based on legitimate business reasons, and he harbored no animus toward Adams. (*Supra* Sec. III(A-H).) As the dissent noted, Adams produced no proof from which a reasonable jury could find that there were other decision-makers involved in the RIF selections who had discriminatory animus. Dissent 7.

Yet the majority focused on a few stray remarks found via search terms among Schneider's 9,000-page document production. As the dissent explained, these remarks "are remote in time, are made by employees outside of HBN R&D or by non-decision-makers, are ambiguous as to age animus, or are unrelated to the January 2017 RIF decisional process. Many are taken completely out of context." Further, "almost all of the documents postdated the January 2017 RIF," and Colby testified he had no knowledge of them. *Id.* 6-7.

Under longstanding Massachusetts precedent, these are classic stray remarks that are "not probative of pretext." Dissent 6. Yet they dominated the majority opinion—right from the introductory paragraph—and derailed its analysis of the probative undisputed facts. Based on these stray remarks, the majority erroneously concluded that a jury could find "[t]he RIF was tainted" because it was somehow part of an "explicit corporate strategy to terminate older workers to make room for younger ones." Order 21. There is no evidence to support this theory. Adams cannot overcome summary judgment with such speculative and conclusory assertions. *O'Rourke v. Hunter*, 446 Mass. 814, 821 (2006).

1. The Majority Creates Harmful Public Policy By Questioning Succession Planning, Diversity Initiatives, and Recruiting for Technical Skills.

The undisputed facts showed that the crux of the stray remarks involved succession planning, diversity initiatives, and partnership with a university graduate

program at the cutting edge of specific technology that was critical to Schneider's business.[6] The majority implies that such programs are somehow illegitimate.[7] As the dissent noted, "the diversity policies and succession planning reflected in these documents were consistent with legitimate business objectives and, standing alone, do not permit an inference of pretext." Dissent 16. To frown on such programs is bad public policy. The dissent recognized that Schneider's "diversity initiative furthered the underlying purposes of c. 151B." *Id.* 14-15 n.16.

2. The Appeals Court Introduced A Novel and Overly Expansive Interpretation of "Cat's Paw" Liability.

The majority's detour into stray remarks also led them into misguided reliance on "cat's paw" theory,[8] Order 22 n.23, which is not applicable here, where Colby was the sole decision-maker, applied legitimate selection criteria, and indisputably harbored no discriminatory animus.

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[6] For instance, Arria stated that Schneider wanted to achieve a diverse workforce, "whether that's age, gender, ethnicity, skills, [or] location." Dissent 14 n.16.

[7] The majority commented: "Nothing in this decision should be taken as disapproval of succession planning." Order 21 n.22. Yet by relying on stray remarks referring to succession planning, the majority's opinion unmistakably disapproves of succession planning that is crucial to the success and survival of any organization.

[8] The majority bases its decision in large-part on cat's paw theory despite the fact that Adams never raised such theory until his Reply in the Appeals Court, and even then, he limited it to a passing parenthetical, with no substantive argument. Reply 10. The fact that the doctrine was not timely raised by appellant or briefed by the parties likely contributed to the majority's error.

The SJC has not explicitly applied "cat's paw," but has rejected the majority's reasoning even in cases distinguishable from this one, because on this record it is undisputed that the decision-maker made selections *alone* and *without animus*. *See Mole v. Univ. of Massachusetts*, 442 Mass. 582, 599 (2004) ("The mere fact that a retaliating supervisor provides some of the information on which a decision is based, or initially recommends the adverse employment action to someone higher up in the organization, does not necessarily mean that the decision maker lacks sufficient independence from the supervisor[.]").

The majority not only misapplies but greatly expands cat's paw theory. For instance, the majority states that even if Colby acted as the sole decision-maker—which is an undisputed fact—a jury could still find that he was the "innocent pawn of an undisclosed corporate strategy tainted by unlawful discriminatory animus[.]" Order 22. This is not true. It is undisputed that no one instructed Colby who to choose, and no one could have known that Colby would choose Adams. *Cf. Brandt v. Fitzpatrick*, 957 F.3d 67, 79 (1st Cir. 2020) (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011)) (if employee's "supervisor performs an act motivated by [illegitimate] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under [USERRA]") (emphasis in original);

Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) ("A 'cat's paw' is a 'dupe' who is 'used by another to accomplish his purposes.'") (citation omitted).

As the dissent recognized, "Adams' proof is insufficient to support his theory that Colby acted as an innocent pawn, or the 'cat' of senior management." Dissent 11-12. The majority's finding that senior management may have secretly expressed its alleged animus to Colby "is not a fair inference, but rather is mere speculation." *Id.* 10 n.11. Moreover, the ages of those retained after the RIF belie any claim that there was a plan to remove older workers. (*Supra*, Sec. III(I, L); *Infra*, Sec. V(C).)

C. The Majority Misconstrued Statistical Evidence Fatal to Adams' Claim and Credited Unreliable Expert Evidence.

As the dissent recognized, the majority misconstrued undisputed statistics, which fatally "undermine [Adams'] theory of the case." Dissent 3. After the RIF, of the 36 retained individuals within Colby's group, 12 were older than Adams, and 16 were over age 50. RA 244-46. Of the 10 retained individuals in Colby's group in the same "Function" as Adams, three were older than Adams, four were over age 50, and all but one was over age 45. RA 242, 244-46. "The average age of the [HBN R&D] team under Colby's command immediately before the RIF was 48.9; after the RIF, it remained well into the protected age group (47.1), and five employees retained by Colby in this group were over sixty-two." Dissent 3.

The majority swept these undisputed statistics aside, saying, "[i]t is true and beside the point that many older workers survived the RIF," but "it does not matter

that ... older workers survived the RIF," because a jury could conclude that Schneider "made progress" toward removing older workers. Order 22-23. This conclusion turns the undisputed evidence on its head, defies logic, and contradicts SJC precedent regarding the use of statistics in disparate treatment cases. *See Sullivan v. Liberty Mutual Ins. Co.*, 444 Mass. 34, 55 (2005) ("statistics that do not account for an employer's legitimate, non-discriminatory explanation do not establish pretext.") (citations omitted). The statistics belie the notion that Colby chose Adams because of his age. Dissent 3-5; (*Supra* Sec. III(I, L).)

Further, both parties' experts *agreed* that there was no statistically significant disparity between employees aged 40 and older. *Id.* Yet the majority relied on allegations by Adams' expert that the dissent recognized as "unreliable and not probative of age discrimination." Dissent 3-4. Indeed, Adams' expert was expressly instructed not to consider what comparators were similarly situated (the essence of a disparate treatment claim); based his analysis on a larger group than that from which Colby made his RIF selections; used a "random methodology" based on the wrong data, ignoring the statutory classficiation of employees 40 and older; and ignored *all* factors upon which Colby based his selections. *Id.* 4-5.

D. The Majority Opinion Creates Legally Unfounded and Unworkable Obligations on Employers Conducting RIFs.

One of the many critical undisputed facts ignored by the majority is that Colby tried to prevent having to select his friend Adams in the RIF and inquired about other

potential positions. *Id.* 12-13 n.13; (*Supra* Sec. III(D).) Yet the majority speculated that Colby could also have reached out to a colleague in Procurement from the Secure Power Division, Christopher Granato, who may have offered Adams a temporary contractor position. Order 4, 8-10; Dissent 12-13, n.13. The majority thus creates an affirmative obligation on employers exhaustively to seek alternative positions for older employees before conducting a RIF, until they find one. This has no basis in precedent, and is bad public policy. *See Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533, 539 (1st Cir. 1996) ("employers conducting a [RIF] face no obligation to offer 'lower echelon, poorer paying jobs in the restructured enterprise' to all older employees.").

VI. CONCLUSION

The trial court's Decision granted Schneider summary judgment on all counts. Two of the three Appeals Court justices who heard oral argument agreed that summary judgment was proper. Those justices vigorously dissented, expressing alarm about significant errors on procedure and substance by the three-justice majority. Schneider requests that this Court grant further appellate review on these important questions, which have broad ramifications affecting the public interest and the interests of justice.

Respectfully submitted,

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Dated: September 7, 2022

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss **SUPERIOR COURT**
CIVIL ACTION NO.
NO. 1781CV02967

MARK ADAMS

v.

SCHNEIDER ELECTRIC USA, INC., and another[1]

DECISION AND ORDER ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Mark Adams' ("Adams") employment with Defendant Schneider Electric ("SE") ended in January 2017 when he was terminated as part of a reduction in force. Adams, who was fifty-five years old at the time of his termination, brought suit claiming that he was discharged as a result of age discrimination in violation of G.L. c 151B, § 4. He has also alleged that a manager, Defendant Amanda Arria ("Arria") aided and abetted SE's discriminatory termination, and that his termination was in violation of public policy.

Pursuant to Mass. R. Civ. P. 56, Defendants SE and Arria have moved for summary judgment on all of Adams' claims. The court held a hearing on the defendants' motion on May 21, 2020. After considering the parties' arguments at hearing, as well as their submitted memoranda, statement of material facts, and supporting exhibits, the court **ALLOWS** the motion for summary judgment.

BACKGROUND

SE is a large, multi-national energy company. From 2007 until his termination in 2017, Adams worked in the Home and Business Network ("HBN"), a department within SE's Secure Power Division. There are a number of sub-departments within HBN, including Research and

[1] Amanda Arria.

Development ("R&D"), Field Quality Engineering ("FQE"), and Global Supply Chain ("GSC"). Adams originally reported to Chief Engineer Ken Colby ("Colby"), but from about 2009 to 2015 he reported instead to Fred Rodenhiser ("Rodenhiser"). Adams worked at SE's Andover location (often referred to as "Boston" in SE materials).

In 2012, Adams was asked to work on a FQE department project called the Battery Quality Initiative. The project's purpose was to work with SE's global battery suppliers to improve battery safety and quality and prevent battery failures. Adams was tasked with traveling to various suppliers to audit them and determine if they were appropriate suppliers for SE's battery needs. Along with Rodenhiser, Bill Kabai ("Kabai") oversaw Adams' work on the initiative.

In 2015, Adams began reporting to R&D's Group Manager, Mirza Beg ("Beg"). While he reported to Beg in R&D, Adams also continued to work for Rodenhiser on the Battery Quality Initiative. Beg also spent some time on the initiative, and Adams spoke to Beg a number of times about battery failures. Beg praised Adams' work on the initiative in 2015 performance review; Adams received a raise as a result. In 2016, Adams continued to report to Beg in R&D, but spent most of his time working for FQE on the Battery Quality Initiative.

In 2016, Colby became Director of Engineering for the R&D group at HBN Boston. Colby reported to Jim Munley ("Munley"), who in turn reported to SE's Senior Vice President of Engineering, Pankaj Sharma ("Sharma"). As discussed in further detail below, in December 2016, Sharma informed Colby that he needed to reduce his R&D budget by a certain amount. Colby determined that he would have to implement a reduction in force ("RIF") to meet his goal. Colby ultimately selected Adams, along with six other R&D employees, for the RIF. Adams was informed of his termination on January 27, 2017.

DISCUSSION

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue and that it is entitled to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting evidence negating an essential element of the non-moving party's case, or by demonstrating that the non-moving party has no reasonable expectation of proving an essential element at trial. See *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991). Once the moving party satisfies its burden, the burden shifts to the party opposing summary judgment to allege specific facts establishing the existence of a genuine issue of material fact. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991).

As three of Adams' claims can be dealt with summarily, the court addresses those counts first, before moving on to the remainder of his claims.

Count Two: "Knowing" Age Discrimination

Count Two largely duplicates the allegations in Adams' age discrimination claim, but adds the allegation of a "knowing" violation of G.L. c. 151B, § 4. This is not a separate and distinct claim. Rather, the damages provision of G.L. c. 151B, § 9 provides for enhanced damages in the event of a "knowing" violation of § 4. See G.L. c. 151B, § 9. See also *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 321 (1993) ("In the case of a knowing or reckless statutory violation [of § 4], those remedies include mandatory double (and discretionary treble) damages"). Therefore, summary judgment shall enter for the defendants on Count Two.

Count Three: Age Discrimination, Pattern and Practice

Similar to Count Two above, the court is unaware of any definitive statute or case stating that so-called "pattern and practice" discrimination is a distinct cause of action, separate from a standard § 4 discrimination claim.[2] Rather, "pattern and practice," as it appears in Massachusetts cases, appears to be a method of proving the plaintiff's burden under stage three of the burden-shifting framework, discussed below. See, e.g., *Fridrich v. L-3 Servs.*, 83 Mass. App. Ct. 1115 at *6 (2013) (Rule 1:28 decision) (plaintiff's evidence of "pattern and practice" in laying off older employees insufficient to meet third stage burden). As such, Count Three appears duplicative of Count One, and judgment shall enter for the defendants.[3] The parties' arguments and evidence on this topic will instead be considered in relation to Count One.[4]

Count Four: Age Discrimination, Disparate Impact

As with Counts Two and Three above, "disparate impact" discrimination is not a separate and distinct cause of action; it is one method available to a plaintiff to prove his or her discrimination claims. See *Porio v. Department of Rev.*, 80 Mass. App. Ct. 57, 68-69 (2011), citing *School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination*, 377 Mass. 424, 428-429 (1979) ("[the SJC] spoke of disparate treatment and disparate impact as 'two

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[2] Defendants point out, that under the Federal anti-discrimination law, "pattern and practice" claims arise primarily in the context of class-action lawsuits. Even there, however, "pattern and practice" refers to a method whereby the class may prove its claims; "pattern and practice" discrimination does not appear to be a standalone cause of action. See *Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135, 148 (2d Cir. 2012) (explaining the history of "pattern and practice" and its relation to class-action suits).

[3] Adams' cited case supports the court's conclusion. In *Charles v. Leo*, 96 Mass. App. Ct. 326, 333 (2019), the Appeals Court held that on her failure to promote claim, the plaintiff could, in lieu of proof that she applied for a promotion, offer proof that such application would have been futile, given the employer's consistent "pattern or practice of discrimination." *Id.* The Court did not, as Adams argues, "allow[] a single plaintiff pattern [and] practice claim[] to be heard on the merits." Docket No. 50.3 at 15.

[4] Furthermore, even assuming "pattern and practice" discrimination could stand as its own count, Adams' claim here fails because it is based solely on the 2017 RIF—a single event. See, e.g., *Sperling v. Hoffman-La Roche*, 924 F. Supp. 1346, 1361 (D.N.J. 1996) (rejecting "pattern and practice" argument where policy at issue was a single RIF; proof of "pattern and practice" must show that "unlawful discrimination has been a regular procedure or policy followed by an employer").

manners' of demonstrating a discrimination claim, not as distinct causes of action"). Therefore, judgment shall enter for the defendants on Count Four, and the parties' arguments thereto shall be considered in the court's discussion of Count One, below.

Count One: Age Discrimination

1) Legal Framework

Massachusetts courts have construed G. L. c. 151B as containing four elements an employee must prove to prevail on a claim of discrimination in employment: (1) membership in a protected class; (2) harm; (3) discriminatory animus; and (4) causation. See *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 502 (2001). In cases such as this, where the claim is one of discrimination based on age, the first two elements are seldom disputed. Rather, the conflict arises as to the latter two elements. Direct evidence of those elements rarely exists, see *Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 665 (2000), and a plaintiff may therefore establish one or both by indirect or circumstantial evidence using the familiar three-stage, burden-shifting paradigm first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973) (*McDonnell Douglas*). The three-stage order of proof "does not circumvent the plaintiff's burden to prove all the essential elements of a discrimination claim, but does permit the jury to infer discriminatory animus and causation from proof that an employer has advanced a false reason for the adverse employment decision, in the absence of direct evidence that the actual motivation was discrimination." *Knight v. Avon Prods., Inc.*, 438 Mass. 413, 422 (2003). See *Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. 107, 116 (2000), citing *McDonnell Douglas*, 411 U.S. at 802.

Here, Adams has not produced any direct evidence of age discrimination. The court thus considers whether he has adduced sufficient indirect or circumstantial evidence to survive

summary judgment. While summary judgment is admittedly a disfavored remedy in discrimination cases based on disparate treatment, see *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 439 (1995), courts have upheld summary judgment in favor of defendants where their motions demonstrate that the plaintiff is unable to offer admissible evidence of the defendant's discriminatory intent, motive, or state of mind sufficient to carry the plaintiff's burdens. See *id.* at 440, and cases cited.

2) Analysis

a) Stage One – Prima Facie Case

Under the *McDonnell Douglas* formulation, Adams bears the initial burden of establishing by the preponderance of the evidence a prima facie case of discrimination. "[His] burden is not onerous." *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 40 (2005), citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Adams must simply produce sufficient evidence that SE's actions, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Generally, a plaintiff who is terminated from his position establishes a prima facie case of discrimination by producing evidence that (1) he is a member of a class protected by G.L. c. 151B; (2) he performed his job at an acceptable level; (3) he was terminated; and (4) his employer sought to fill his position by hiring another individual with qualifications similar to his. See *Abramian*, 432 Mass. at 116. Here, it is undisputed that Adams satisfies the first three

elements of this formulation of the prima facie case.[5] However, the parties fiercely contest the fourth element.

The Supreme Judicial Court has concluded "that a plaintiff in a reduction in force case may satisfy the fourth element of [his] prima facie case by producing some evidence that [his] layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination." *Sullivan*, 444 Mass. at 45.

Here, Adams relies on the following evidence to establish his prima facie case: (1) that all employees terminated as part of the RIF were over 40; (2) that Adams' expert concluded that the RIF disproportionately affected employees over 50;[6] (3) that SE had "diversity initiatives" to encourage a diverse workforce, including age diversity; (4) that in 2015 an HBN leader in Andover recognized that he needed "age diversity" and was "stocking his team with young talent"; (5) that Arria received approval to hire a "qualified young engineer" in 2015, in part due to the need for "age diversity" in the Andover office; (6) that, in September 2016, Arria and Sharma gave a presentation that mentioned "Age/Gender demographics" as an "Opportunit[y]" for HBN; (7) that, even during a "hiring freeze" in 2016, SE and HBN made efforts to recruit Ph.D. students from Virginia Tech to fill "critical skill areas"; (8) that in July 2017 (after Adams' termination) Arria sent an email to her superior, Bin Lu, addressing "age demographic

[5] As for the second element, in a RIF case the discharge is not the result of the employer concluding that an individual is not performing well; presumably before layoffs, every plaintiff in such a case is performing "at an acceptable level" or he would have been discharged before a RIF occurs.

[6] While evidence that a RIF has a disproportionate impact on members of a protected class sometimes may help establish a prima facie case of discrimination, see, e.g., *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 508-509 (2001) (statistical evidence may support inference that particular decision was made because of discriminatory animus), the first stage of *McDonnell Douglas*, the prima facie case, should not be the occasion for battling statisticians. *Sullivan*, 444 Mass. at 46 n.16. "The third stage is the more appropriate stage for the employer to establish that the plaintiff's statistical evidence is unreliable or not probative of discrimination because the statistics do not account for factors pertinent to the employer's selection process." *Id.*

challenges" and suggesting an early retirement program in order to make room to "hire in some of the college talent we have been discussing"; (9) that a presentation given in August 2017 (after Adams' termination) highlighted negatives of HBN R&D centers, which included "aging workforce, low R&D utilization, low energy level and speed"; (10) that in a May 2017 (after Adams' termination) email, a manager appeared to question the inclusion of several employees over 50 in a "Talent Connect" session of an upcoming "Leadership Meeting"; (11) that in a September 2017 (after Adams' termination) email chain, there appeared to be confusion between Colby and another manager regarding SE's hiring practice, specifically, whether to use a vendor to hire a "highly experienced" candidate, or recruit new hires from Virginia Tech; and (12) other evidence that, Adams asserts, is probative of SE's discriminatory animus against older employees. Weighing against him is the uncontested fact that, of the ten employees categorized in the same "Function" as Adams that SE retained after the RIF, all but one was over age 45, including four that were over age 50, and three that were older than Adams. Additionally, of the thirty-seven employees retained in Colby's group after the RIF, twenty-seven (72.9%) were over age 40.

The court concludes that Adams has established a prima facie case of age discrimination because the RIF occurred in circumstances that raise a reasonable inference of unlawful age discrimination. SE's concerns about its aging workforce, its interest in seeking out and hiring "young talent," while at or about the same time implementing hiring freezes, RIFs, and proposing programs such as an early retirement incentive, particularly when combined with the fact that all seven employees SE discharged as part of the RIF were over forty years of age, would permit a reasonable jury to conclude that SE's termination of Adams, "if otherwise

unexplained, [is] more likely than not based on the consideration of impermissible factors." *Furnco Constr. Corp.*, 438 U.S. at 577.

b) Stage Two – Employer's Response

Adams having established a prima facie case of age discrimination, the burden shifts to SE in the second stage of the *McDonnell Douglas* framework. SE may satisfy its burden "by articulating 'a lawful reason or reasons for its employment decision [and] producing credible evidence to show that the reason or reasons advanced were the real reasons.'" *Abramian*, 432 Mass. at 116, quoting *Blare*, 419 Mass. at 442. SE's burden at this stage is one of production and not persuasion; SE "need not prove that the reasons were nondiscriminatory." *Abramian*, 432 Mass. at 117.

"[T]he question is why, given [SE's] need to reduce [its] workforce, [it] chose to discharge the older rather than the younger employee[s]." *Sullivan*, 444 Mass. at 51. Although SE's burden at this stage is one of production only, SE "nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation." *Texas Dep't of Community Affairs*, 450 U.S. at 258.

Colby, who alone oversaw the RIF, testified as follows:

In early December 2016, Colby was told by Sharma that he needed to reduce the expenses for his group. As the majority of his budget went to personnel costs, Colby understood this request to mean that he would need to implement a RIF. Having never done a RIF before, Colby asked his supervisor, Munley, for some guidance. Munley advised him to consider three points: (1) see if any of Colby's employees were doing most of their work outside of R&D, in order to limit the effect of letting go of employees who worked primarily on R&D projects; (2)

look at whether reducing employees in certain functions would have more or less impact on the team; and (3) see whether any manager positions could be consolidated. Colby had no other input on how to conduct the RIF.

Colby had 45 employees to consider for the RIF. Of those, he estimated that 30 to 35 were too critical to various R&D projects to be considered for the RIF. Applying criteria based on the advice Munley gave him, Colby created a spreadsheet with a ranking system and notes that listed the "Pros" and "Cons" of each employee and "Impact" of selecting the employee for the RIF. Colby also grouped employees by job "function" to assess their criticality. For Adams, Colby wrote "Hard worker" under "Pros", and under "Cons" wrote "Behaviors" and "Does not care for standard work".[7] Colby also considered whether Adams could be moved to a different team. Ultimately, Colby selected seven employees, including Adams, for the RIF. Colby did not consider any employee's age in making his selections, and no one else instructed him to. Colby selected Adams because Adams spent most of his time on projects outside R&D, meaning the impact to R&D project would be minimal, and because Adams did not care for "standard" R&D work. Colby's decision was adopted by his supervisors.

SE has also produced evidence explaining why it retained certain employees, some of whom were under age 40. As noted, Colby stated that some employees were "critical" to "crucial projects" that his team was responsible for, and could not be eliminated.[8] In addition, five of the job functions evaluated by Colby consisted exclusively of employees over 50, meaning that the likelihood of selecting an older employee in one of those functions was 100%. Finally, Colby

[7] By "standard work," Colby meant that Adams preferred working for FQE on the Battery Quality Initiative, where he spent most of his time, and did not enjoy regular R&D work.

[8] For example, Colby testified that between Adams and another employee to whom Colby gave similar positive comments and whose loss would have a similar impact on his projects as Adams', he chose Adams because the other employee worked 100% on a R&D project.

attempted to retain Adams by asking Kabai if he could take Adams in Field Quality Engineering, but Kabai informed Colby he did not have room. The court concludes that SE has articulated a credible nondiscriminatory reason for its choice to terminate Adams by demonstrating that Colby engaged in a legitimate RIF and chose Adams to be terminated because he did not enjoy R&D work and his loss would have less impact on SE's R&D projects.

c) Stage Three – Evidence of Discrimination

Because SE has succeeded "in carrying its burden of production, the *McDonnell Douglas* framework -- with its presumptions and burdens -- is no longer relevant." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). "The presumption of discrimination disappears." *Sullivan*, 444 Mass. at 54. The burden returns to Adams to establish that the basis of SE's decision was unlawful discrimination "by adducing evidence that the reasons given by [SE] for its actions were mere pretexts to hide such discrimination." *Lewis v. Boston*, 321 F.3d 207, 214 (1st Cir. 2003). "This may be accomplished by showing that the reasons advanced by [SE] for making the adverse decision are not true." *Abramian*, 432 Mass. at 117.

Adams first argues that the disproportionate impact the RIF had on older employees raises inferences of discrimination.[9] Adams points to evidence, noted above, all seven employees selected for the RIF were over 40, and that his expert concluded that the RIF disproportionately affected employees over age 50. Although this evidence helped Adams establish his prima facie case, it has limited probative value at this stage. The expert's report fails to address or rebut SE's proffered reasons for terminating Adams and does not, by itself, create reasonable inferences of

[9] As noted earlier, statistical evidence may be used to prove intentional discrimination in a disparate treatment case such as this. See *Smith v. Xerox Corp.*, 196 F.3d 358, 370 (2d Cir. 1999) ("In contrast to a disparate impact claim, where the focus is on how a facially neutral employment practice affects a protected group, a disparate treatment claim looks at how an individual was treated compared to her similarly situated coworkers. Thus, statistical analyses that compare coworkers who competed directly against each other to receive a benefit, here selection for retention, are appropriate").

discriminatory animus and causation. See *Sullivan*, 444 Mass. at 55, citing *Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 559 (7th Cir. 2001) (statistics that do not account for employer's legitimate nondiscriminatory explanations do not establish pretext). Similarly, as SE's expert points out, Adams' expert fails to eliminate other explanations for the disproportionate statistics, such as random chance (given the small discrepancies and small sample size involved here) or the actual distribution of the factors Colby considered within the differing ages both before and after the RIF. See, e.g., *Smith v. Xerox Corp.*, 196 F.3d 358, 371 (2d Cir. 1999) (statistics that do not account for other possible causes of disparity do not establish pretext); *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747 (10th Cir. 1991) (statistics must eliminate nondiscriminatory reasons for disparity).[10]

Adams next attacks the RIF as pretext because the evidence, noted above, shows that SE's management was concerned primarily with eliminating its older employees in order to make room for younger ones, who had more potential benefit to SE. The issue with Adams' argument on this point is that none of the individuals mentioned (Arria, Beg, Sharma, Gautreau, etc.) had any involvement in selecting employees for the RIF. While the order to reduce expenses came from higher up, Colby testified that he had sole authority and control over formulating the criteria to use in evaluating his employees, applying those criteria, and ultimately choosing who to eliminate. See *Somers v. Converged Access, Inc.*, 454 Mass. 582, 597 (2009) ("statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy the plaintiff's threshold burden in these cases"). Adams has offered no evidence to

[10] SE's expert also notes that the sample size used by Adams' expert – the entire HBN R&D department (74 employees) was inaccurate because Colby only evaluated and selected for termination those employees under his direct control (43 employees). When the tests were conducted using the smaller sample size, SE's expert discerned no disparate impact to any specific age group.

suggest otherwise. Indeed, he has conceded that Colby, who is undisputedly the only person who chose Adams for the RIF, harbored no discriminatory animus towards him due to his age.

The court concludes that Adams' proof is insufficient, as a matter of law, to show that, when he was terminated, SE had a discriminatory intent, motive, or state of mind based on his age and that any such animus was "a material and important ingredient in the discharge." *Knight*, 438 Mass. at 426-427. He also fails to point to any evidence rebutting SE's nondiscriminatory explanations for retaining younger employees, all of whom had different functions and worked on different projects than Adams. In summary, Adams' evidence does not permit a reasonable inference that SE selected him for layoff for any reason other than the criteria Colby testified to. Therefore, the defendants are entitled to summary judgment on Count One.

Count Five: Aiding and Abetting

Given the inadequacy of the proof of age discrimination, this derivative claim fails as matter of law. See *Russell v. Cooley Dickinson Hosp., Inc.*, 437 Mass. 443, 458 n.7 (2002).

Count Six: Wrongful Termination in Violation of Public Policy

In the alternative, Adams claims that his termination violated public policy, because it was based on his discussion of potentially dangerous battery failures with Beg.

While an employer is free to terminate an at-will employee "without notice, for almost any reason or no reason at all," *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. 469, 472 (1992), a limited exception prevents discharging an employee in violation of a "clearly established public policy." *King v. Driscoll*, 418 Mass. 576, 582 (1994). This exception is interpreted narrowly, and is limited to instances where an employee is terminated for (1) asserting a legally-guaranteed right, such as filing a workers' compensation claim, (2) fulfilling a legal duty, such as serving on a jury, (3) refusing to commit an illegal act, such as perjury, (4)

cooperating with law enforcement in an investigation against the employer, or (5) making an internal report of suspected criminal conduct. *Wright*, 412 Mass. at 472-473. See *Shea v. Emmanuel Coll.*, 425 Mass. 761, 762-763 (1997). In addition, G.L. c. 149, § 185(b)(1) provides that

> An employer shall not take any retaliatory action against an employee because the employee . . . [d]iscloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . which the employee reasonably believes poses a risk to public health, safety or the environment[.]

A plaintiff must "produce evidence sufficient to meet [his] burden of proving a causal relationship between" his termination and the protected conduct. *Prader v. Leading Edge Prods., Inc.*, 39 Mass. App. Ct. 616, 618 (1996).

Here, Adams asserts that, as part of his role in the Battery Quality Initiative, he identified and reported defects, such as SE's improper battery placement, that could cause the battery failures he was tasked with investigating. He contends that upon his reports, "Beg feigned indifference, argued with Mr. Adams, and, at least on one occasion, threatened Mr. Adams with his job," and that his termination as part of the RIF occurred after his last conversation about battery failures with Beg. However, the portions of Adams' deposition testimony he cites in support of these allegations, other than identifying unspecific times when he reported battery issues, merely states that "Mirza didn't seem to like my openings too much, though, when I complained about the battery fires." Ex. 20 at 132.[11]

Missing from Adams' argument is evidentiary support for two elements critical to his claim: that his internal "reports" of unsafe battery design/usage are protected pursuant to a "clearly expressed" legislative policy, *Wright*, 412 Mass. at 474, and that his termination was

[11] Adams also noted the when he raised the issue with Beg, Beg would claim not to know what Adams was talking about, which Adams felt was feigned because he knew Beg to be highly intelligent.

causally connected to those reports. As to the former, even Adams' "socially desirable conduct" in performing his job by raising battery safety concerns to his supervisor cannot serve as grounds for a wrongful termination claim. See *King*, 418 Mass. at 583-584.[12] And as to the latter, there is no evidence that SE "would not have discharged him but for [his] conduct[.]" *Mello v. Stop & Shop Cos.*, 402 Mass. 555, 558 (1988). Colby testified that he had no knowledge of any battery issues, and he was the only person who selected Adams for termination. "An assertion or speculation that [SE] discharged [Adams] for that reason is not sufficient to create a dispute of material fact concerning the reason for [his] discharge." *Shea*, 425 Mass. at 763-764. Therefore, defendants are entitled to summary judgment on Count Six.

ORDER

For the foregoing reasons, Defendants' Schneider Electric's and Amanda Arria's Motion for Summary Judgment is **ALLOWED**. Judgment shall enter for the defendants.

SO ORDERED.

12/16/2020
Date

William M. White, Jr.
Associate Justice
Woburn Superior Court

[12] The cases Adams cites in support of his argument, both of which concern legislatively-defined public safety issues, are inapposite. In *Norris v. Lumbermen's Mut. Cas. Co.*, 881 F.2d 1144, 1152-1153 (1st Cir. 1989), the First Circuit, citing Federal law, held that an employee's termination for reporting safety issues with nuclear power plants may have violated the legislatively-established public policy of protecting "citizens from the hazards of radioactive material." *Id.* In *Mercado v. Manny's T.V. & Appliance, Inc.*, 77 Mass. App. Ct. 135, 140-141 (2010), the Appeals Court held that an employee's termination for refusing to install gas stoves illegally and incorrectly may have violated public policy because the legislature adopted the plumbing and gas codes in order to protect public health. Adams has identified no similar legislatively-adopted public health measure regarding the batteries he worked on.

MARK A. ADAMS vs. SCHNEIDER ELECTRIC USA.

No. 21-P-158.

Middlesex. December 14, 2021. – August 17, 2022.

Present: Green, C.J., Meade, Rubin, Henry, & Singh, JJ.[1]

Anti-Discrimination Law, Age, Termination of employment, Prima facie case, Burden of proof. Employment, Discrimination, Termination. Practice, Civil, Summary judgment, Burden of proof.

Civil action commenced in the Superior Court Department on October 11, 2017.

The case was heard by William M. White, Jr., J., on a motion for summary judgment.

Robert S. Mantell (Ilir Kavaja also present) for the plaintiff.

Christopher W. Kelleher for the defendant.

[1] This case initially was heard by a panel comprised of Justices Meade, Henry, and Singh. After circulation of a majority and dissenting opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Rubin. See Sciaba Constr. Co. v. Boston, 35 Mass. App. Ct. 181, 181 n.2 (1993).

HENRY, J. The plaintiff, Mark A. Adams, a former employee of Schneider Electric USA (Schneider or company), appeals from a summary judgment entered in favor of Schneider on his age discrimination claim.[2] See G. L. c. 151B, § 4 (1B). The summary judgment record in this case contains something rarely seen in discrimination cases: an e-mail trail documenting that Schneider was so concerned about its "aging" Boston work force that it instituted a series of reductions in force (RIF) designed to shed older workers to make room for "young talent." Viewed in the light most favorable to the nonmoving party, here Adams, a rational fact finder could find that the company engaged in a systematic effort to replace older workers, including Adams, to make room to hire younger ones, and that Adams lost his job as a result.

Because there were facts in dispute from which a jury could find that age was not "treated neutrally" either in calling for the RIF or in selecting Adams for the RIF, summary judgment should not have been granted. Accordingly, we reverse.

[2] Prior to the summary judgment, Adams dismissed his claims against individual defendants Mirza Akmal Beg and Michelle Gautreau. On appeal, Adams proceeds solely on count one of his first amended complaint ("age discrimination based upon disparate treatment") against Schneider. He has waived all other claims, including his claims against the remaining individual defendant, Amanda Arria.

Standard of review. In reviewing a grant of summary judgment, we assess the record de novo and take the facts, together with all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party. See Godfrey v. Globe Newspaper Co., 457 Mass. 113, 119 (2010). "[T]he court does not 'pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts.'" Shawmut Worcester County Bank, N.A. v. Miller, 398 Mass. 273, 281 (1986), quoting Attorney Gen. v. Bailey, 386 Mass. 367, 370, cert. denied, 459 U.S. 970 (1982). Viewing the facts in this light, we then determine whether the moving party has affirmatively shown that there is no real issue of fact, "all doubts being resolved against the party moving for summary judgment." Id. The record at hand, viewed with these principles in mind, showed the following.

Factual background. Schneider is a large global conglomerate with offices and facilities located in one hundred countries. Schneider has numerous divisions and subdivisions or "departments," and a complicated organizational structure. At all relevant times, Adams was employed as an electrical engineer in the secure business power group of the home and business network in the research and development subdivision (HBN R&D).[3]

[3] Other subdivisions of HBN included medium, product marketing, channel, field quality engineering, and global supply

He worked out of Schneider's Boston One Campus in Andover (BOC or Boston).[4]

Around 2012, Adams began working on Schneider's battery quality initiative project supporting the field quality engineering and procurement teams headed by William Kabai and Christopher Granato. As a member of the "Battery A-team," Adams visited suppliers all over the world, investigating battery failures and fixing problems, assisting with the development of processes to improve quality, writing protocols and checklists for suppliers, auditing suppliers to ensure they were complying with manufacturing standards, and validating potential new suppliers.

In 2015, Adams began reporting to Mirza Akmal Beg, who also contributed to the battery quality initiative; the two spoke dozens of times about battery failures. In 2016, Adams was pulled from the battery quality initiative to work on the restricted other hazardous substances project (ROHS), an

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chain. The various subdivisions of HBN collaborated on certain topics. HBN itself was organized under the information technology division.

[4] The company referred to the Andover campus interchangeably as "Boston" or "the Boston campus."

important engineering project of HBN R&D.[5] That year, Schneider implemented a number of internal reorganizations and two RIFs.

1. The RIFs. Amanda Arria was a human resources (HR) leader for the company's Boston office during the time period relevant to the layoffs.[6] She stated that she "partner[ed] with the leadership team to ensure we have the right people strategies in place for the business success." In October 2015, fifteen months before the January 2017 RIF through which Adams was terminated, Colin Campbell, vice-president of the information technology division (ITD), wrote in an e-mail message to Arria that the "[b]usiness [p]ower team in Andover needs age diversity. The embedded system team leader recognizes this and has been stocking his team with young talent. I'd like to encourage this more." In the months that followed, the company did just as Campbell suggested.

From April 2016 to January 2017, the company conducted three RIFs. Twenty-three of twenty-four terminated employees were over the age of forty and twenty-two of the twenty-four were over the age of fifty. In an April 2016 RIF, six of seven terminated employees were over the age of forty and five of

[5] Schneider needed to make all of its products conform to new environmental standards for the European market by June 2017.

[6] Shortly after the January 2017 RIF, Arria was promoted to become vice-president of global HR for the company.

seven were over fifty. In a May 2016 RIF, all nine terminated employees were age forty-eight or older and six of the nine were over age fifty. Adams was terminated by the company in January 2017 at the age of fifty-four. All eight of the employees selected for this third RIF that included Adams were over the age of fifty.

2. Colby's selection of Adams for the January 2017 RIF. In December 2016, the senior vice-president of HBN, Pankaj Sharma, "gave cost take-out targets to each of his leaders." Sharma informed Kenneth Colby, who had recently been promoted to the position of director of engineering of HBN R&D, that he needed to cut twenty-two percent of his budget, the equivalent of around €1.7 million.[7] Sharma, whose office was in Singapore at that time, left the specifics of how to meet the goal up to Colby. Colby understood that because the majority of his budget was spent on personnel, that meant the majority of the reduction would have to be a reduction in the number of employees, referred to by the parties as "headcount." Once Bin Lu was

[7] On several occasions before Colby became director, Sharma and Colby had discussed that the business "had been flat or negative for a number of years." The major part of Colby's budget was the salaries of his forty-five member team. Sharma, in consultation with the finance team, subsequently decreased the target number.

hired as vice-president of HBN global R&D in February of 2017, he supervised Colby.

Colby testified as follows as to how he came to include Adams in the January 2017 RIF: Colby approached Jim Munley, the vice-president of the project management office, his boss in his previous position, for guidance. Munley provided Colby with three pieces of advice in making his selections: look for employees who are working the majority of their time outside of HBN R&D, supporting other teams; select employees whose loss would have the least impact on the HBN R&D team and goals; and consider consolidating management positions. After evaluating and ranking his employees, Colby selected eight for layoff, including a manager and Adams. Their ages ranged from fifty-four (Adams) to sixty-two.

Colby also testified that before making his selections, he prepared a spreadsheet listing factors such as "pros," "cons," "impact," and salaries. Under Adams's "cons," Colby wrote, among other things, that he "[d]oes not care for standard [R&D] work." Colby explained that Adams "really enjoyed" field quality work and all aspects of the work supporting the field quality team; in contrast, Adams did not really enjoy the HBN R&D ROHS work assigned to him (on which he spent around twenty-five percent of his time). As for the impact posed by Adams's separation, Colby concluded that there would be a "big impact

short-term" on the ROHS work and a "huge impact" on the battery initiative supporting other HBN subdivisions. Under comments, Colby questioned whether Adams could be moved to field quality engineering. One of the two managers on the final RIF list of eight was selected by someone other than Colby.

In January 2017, Colby met with Sharma, Gregoire Rougnon from "finance," Munley, Arria, and Michelle Gautreau (an HR employee who reported to Arria) to review every person on the RIF list and the potential business and financial impact on the company from each separation. Before the RIF, Colby's reports included thirty-eight employees ages forty and over and eleven employees under age forty.[8] All employees Colby selected for the January 2017 RIF were age fifty-four or older.

The record reflects that Colby had the discretion to inquire about transferring Adams to another department, which would have met Colby's need to reduce his budget while saving Adams's job. Considering the evidence in the light most favorable to Adams, Adams was key to Granato's department (Granato was a peer of Colby and Kabai). Yet neither Colby nor anyone else gave Granato advance notice that Adams would be in Colby's RIF. Granato learned after the fact that Adams was terminated. Colby did give advance warning to Kabai that Adams

[8] It is possible there were thirty-nine employees; Colby was not sure whether one position reported to him.

would be in the RIF, but not that Colby had asked at that time to move Adams to Kabai's department.[9]

On January 27, 2017, Colby called Adams at home and informed him of his termination, effective January 30, 2017.[10] He instructed Adams not to return to the office. HR followed up the call with written notification and a severance package offer, which Adams declined.[11]

Once the January 2017 RIF was announced, Granato and Kabai discussed trying to keep Adams, but Colby was not involved in that conversation. Granato had funding to retain Adams in some capacity and asked Colby about the possibility. Colby dissuaded Granato from trying to retain Adams. Instead, Colby assured Granato that "they'd figure out something to support [Granato's] project going forward." In the light most favorable to Adams, a jury could infer that Colby failed to tell Granato in advance of

[9] The dissent concludes that Colby did approach Kabai but, again, the jury are not required to believe this. In any event, Kabai approached his manager, who was Sharma, to confirm there was no headcount in that group to retain Adams.

[10] Adams and Colby were longtime friends. At various times, Adams had reported to Colby, Beg, and another manager, Fred Rodenhiser.

[11] As required by Federal antidiscrimination law, the company provided Adams with the job titles and ages of all employees discharged as part of the RIF as well as those retained.

the RIF and Colby thwarted Granato's attempt to retain Adams in order to reduce the number of older workers.

3. Post-RIF evidence. In a series of e-mails following the three RIFs, the highest tiers of management reviewed the status of their plan to reduce the number of older workers to make room to hire recent college graduates. In fact, following the RIFs in 2016 and January 2017, there was an active effort to recruit recent college graduates.[12]

A plethora of e-mails and presentations in 2017 referred to the company's desire to eliminate older workers in favor of "early career" hires, explicitly defined as hires under age thirty. An analysis of the Boston office compared to company locations in other countries described weaknesses in the Boston

[12] The company offered evidence that the goal was to recruit recent college graduates to obtain specific skill sets. However, as explained in the discussion infra, a jury need not believe this evidence, and so we disregard it on summary judgment. The company offered no evidence that only recent college graduates would have the desired skill sets, or that the older workers lacked them. The company performed a skill set review of workers under forty. No such review was done of older workers.

workforce as, among other things, "aging" and "[l]ow energy level and speed."[13,14]

In May 2017, Jiri Cermak, a senior vice-president of HR, e-mailed Arria and Brian Gough, who was Arria's peer for other businesses within the ITD. Cermak attached a PowerPoint presentation that suggested, among other things, "[m]ore early career talents," but noted that "[w]e can not increase SFC → need to create the space."[15] Arria testified that "SFC" means

[13] Our review is somewhat hindered by the fact that Adams's counsel at deposition referred to documents by exhibit number without ever indicating the corresponding document control number and in some cases without including the document in the record. For example, the record includes the testimony of numerous witnesses about a document that referred to "[d]eeper cuts for college grads," but that document is not included in the record. Without context, that document could mean polar opposite things -- that the company was making deeper cuts in college hiring or that it was making deeper cuts of current employees to be able to hire college graduates. In the summary judgment context, we must interpret the document in the light most favorable to Adams.

[14] The company also referred to Boston's older workers as "[h]igh R&D labor cost." The United States Supreme Court has signaled that employment decisions based on expense from years of service are not discrimination based on age. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-613 (1993). The Supreme Judicial Court has not indicated whether it agrees. This could be significant in a case like this where a department leader is required to reduce their budget by a certain dollar amount. The mathematical reality is that one can terminate a fewer number of more expensive workers, who tend to be older workers, to leave a larger retained workforce to complete the work.

[15] All quotations from documents in the record appendix are as they were written, including symbols, without correction or comment on grammar. Any emphasis is in the original unless otherwise indicated. We do not include shading.

operating expenses. Other presentations also emphasized the need for early career talents.

The meaning of the euphemism "create the space" was fleshed out more explicitly in an e-mail two months later. In July 2017, Arria e-mailed Lu, Colby's boss, and forwarded the e-mail to Sharma. Sharma was the leader of HBN, the superior of Colby's superior; Colby agreed that Sharma was "the big boss." Arria wrote, "I have been thinking more about the age demographic challenges we are facing in BOC (and to some extent in Taiwan as well), and our desire to make some budget/headcount room to hire some junior level talent. I am also excited about the university partnerships we discussed a few weeks ago, as a feeder group to accomplish this" (emphasis added).[16]

In another e-mail in July 2017, Arria wrote to Cermak that the 2017 RIF was part of a continuing effort by the company to reduce the number of older employees to create room to hire younger employees. She stated, "As you are aware we did a lot of activity in the beginning of the year, but have a few

[16] Arria continued, "I have some ideas about us potentially offering an early retirement program this summer. If we could secure some restructure funds to offer this, we could potentially encourage a few employees to retire and make some budget reductions/room to hire in some of the college talent we have been discussing. There are some legal cautions we would need to take to run a program like this, but if we are careful with our wording and execution we can pull this off effectively in a way that our employees would feel like it was a benefit to them, and benefit the R&D organization as well."

creative ideas we are flushing out around early retirement packages to continue to make room for more early career talent" (emphasis added). She reiterated the point in another July 2017 e-mail to Cermak: "As you are aware most of our action have already occurred earlier this year and are noted here, but we do have some ideas around offering an early retirement package which would also help us make some room for additional early career hires" (emphasis added). She attached a slide listing those employees who had been laid off in 2017, which listed Adams as an involuntary departure. From this document a jury could infer that the January 2017 RIF that resulted in Adams's termination was part of the "activity in the beginning of the year," and that Adams was one of the older workers involuntarily separated to make room for younger hires.[17]

By August 2017, the company had conducted an analysis of its talent. However, it only analyzed employees who fell into certain age demographics -- "Early career," meaning "age under 30," and "Mid career," meaning "age 30-40." Occasionally someone outside these age ranges was included "if they are close

[17] Also in July 2017, Arria e-mailed Sharma, Lu, and Rougnon, stating that there was "a pool of about 7 employees in BOC that are of retirement age, and we expect about 3-4 to volunteer if we offer this [early retirement option]. These position will be replaced but with new."

to the age limits." The company did not analyze the talent of any worker over age forty-two.

The written record also offers evidence that at some point in 2017, Colby was aware of his company's preference for young talent. For example, in September 2017, Colby explicitly instructed another employee to "hold off" on hiring experienced workers while Colby, Gautreau, and Lu met to discuss college recruiting. Kaushal Patel indicated in an e-mail exchange with Gautreau and Colby a desire to hire "more specialized highly qualified individual as opposed to 1 to 3 year experience." Later in the e-mail exchange, Colby acknowledged that Patel was "referring to hiring people with experience" whereas Gautreau was referring to a college recruiting trip for new hires. Colby directed Patel to "hold off" on "hiring people with experience." Colby also was aware that the company considered early career talents to be under thirty and midcareer talents to be ages thirty to forty.

A November 2017 e-mail message from Lu to Colby included the goal "[i]mprove BoC team talent demographics mix though early retirement program and university fresh talent recruiting." Colby was aware of at least one other presentation offering guidelines for midcareer and early career potentials.

The drumbeat continued in January 2018, with Lu giving a companywide presentation to leaders stating that the R&D

department "[n]eeds immediate improvement on demographics and diversity" and comparing the percentage of employees over age fifty in the R&D department companywide (seventeen percent) with the Boston R&D department (forty-five percent). The company continued to want "early career talents" and "high potential young talents."

Discussion. 1. Employment discrimination framework. "In order to prevail at trial, an employee bringing a complaint under G. L. c. 151B, § 4, must demonstrate four things: [(1)] that [they are] a member of a protected class; [(2)] that [they were] subject to an adverse employment action; [(3)] that the employer bore 'discriminatory animus' in taking that action; and [(4)] that that animus was the reason for the action (causation)."[18] Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016). Here, as is typical, the plaintiff's membership in a protected class and the adverse employment action are

[18] Because the case law sets forth a multipart test that includes a three-stage paradigm, the first stage of which includes another multipart test, and some of the parts of the two multipart tests are the same, we label the first test with numbers, identify each stage of the paradigm by "first," "second," or "third," and label the subtest of the first stage of the paradigm with letters. And because the standard draws from several cases, often nesting quotes within quotes and using square brackets to tailor the quotes to a particular case, we omit the internal case citations and brackets in favor of case citation(s) for each paragraph. The general framework can be found in Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680-683 (2016).

undisputed. "Because . . . direct evidence [of the elements of discriminatory animus and causation] rarely exists, . . . an employee plaintiff [asserting discrimination] may also survive [a summary judgment motion] by . . . using . . . [a] three-stage, burden-shifting paradigm" (quotations and citations omitted). Id. at 680-681.[19]

"In the first stage [of this paradigm], the plaintiff has the burden to [establish] . . . a prima facie case of discrimination" (citation omitted). Bulwer, 473 Mass. at 681. The plaintiff must provide "evidence that [(a) they are] a member of a class protected by G. L. c. 151B; [(b) they] performed [their] job at an acceptable level; [(c) they were subject to an adverse employment action, including] terminat[ion]; and . . . [(d) the adverse employment action] occurred in circumstances that would raise a reasonable inference of unlawful discrimination." Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 41, 45 (2005). For a termination, part (d) requires the employee to prove the "employer sought to fill

[19] "Because employees rarely can produce direct evidence of discriminatory animus and causation, see Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 38 (2005), they may survive a motion for summary judgment by producing 'indirect or circumstantial evidence [of these elements] using the familiar three-stage, burden-shifting paradigm first set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973) (McDonnell Douglas).'" Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 396 (2016), quoting Sullivan, supra at 39-40.

[the employee's] position by hiring another individual with qualifications similar to [the terminated employee]." Id. at 41. For an RIF, part (d) is "nonsensical." Id. In an RIF case, the plaintiff may satisfy part (d) "by producing some evidence that [the RIF] occurred in circumstances that would raise a reasonable inference of unlawful discrimination." Id. at 45.

"In the second stage, the employer can rebut the presumption created by the prima facie case by articulating a legitimate, nondiscriminatory reason for [the adverse employment action]" (citation omitted). Bulwer, 473 Mass. at 681.

"In the third stage [of the paradigm], the burden of production [-- the plaintiff employee's obligation to come forward with evidence to support their claim --] shifts back to the plaintiff . . . , requiring the [plaintiff] to provide evidence that 'the employer's articulated justification [for the adverse employment action] is not true but a pretext" (citation omitted). Bulwer, 473 Mass. at 681. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 117 (2000) (employee may meet third stage "by showing that the reasons advanced by the employer for making the adverse decision are not true"). In this third stage, "Massachusetts is a pretext only

jurisdiction" (citation omitted). Bulwer, supra.[20] "To survive a motion for summary judgment, the plaintiff need only present evidence from which a reasonable jury could infer that 'the [employer's] facially proper reasons given for its action against [the employee] were not the real reasons for that action.' The case can then proceed to trial, at which point, 'if the fact finder is persuaded that one or more of the employer's reasons is false, [the fact finder] may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind.' In other words, a fact finder at trial may infer that, '[c]ombined with establishment of a prima facie case . . . , a showing of pretext eliminates any legitimate explanation for the adverse hiring decision and warrants a determination that the plaintiff was the victim of

[20] In this way, Massachusetts has departed from McDonnell Douglas, 411 U.S. at 802-805. Any shorthand references in our cases to our continuing to apply the McDonnell Douglas framework are not, strictly speaking, accurate because they mask that the Supreme Judicial Court has departed from that standard in certain subtle but important respects. In our cases, this shorthand means a modified or pretext only McDonnell Douglas framework. Our decisions do not require that the plaintiff prove that a reason given by the employer for the adverse decision was both false and given to cover a discriminatory animus. See Bulwer, 473 Mass. at 681-682, citing Lipchitz v. Raytheon Co., 434 Mass. 493, 500-501 (2001). In this way, we depart from the Federal analysis under Title VII, which requires a plaintiff to demonstrate that the employer's stated reasons are a pretext for concealing a discriminatory purpose. In employment law vernacular, the Title VII analysis is "pretext plus." Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 442-443 (1995).

unlawful discrimination'" (citations and footnotes omitted). Id. at 682.

While the plaintiff may have the burden of persuasion at trial, "the burden of persuasion at summary judgment remains with the [employer], who, 'as the [party moving for summary judgment, has] the burden of affirmatively demonstrating the absence of a genuine issue of material fact on every relevant issue, even if [the employer] would not have the burden on an issue if the case were to go to trial'" (citation omitted). Bulwer, 473 Mass. at 683.

"In cases involving claims of employment discrimination, a defendant employer faces a heavy burden if it seeks to obtain summary judgment." Sullivan, 444 Mass. at 38. "[S]ummary judgment remains 'a disfavored remedy in the context of discrimination cases based on disparate treatment . . . because the ultimate issue of discriminatory intent is a factual question.' [An employer's] motive 'is elusive and rarely is established by other than circumstantial evidence,' therefore 'requir[ing] [a] jury to weigh the credibility of conflicting explanations of the adverse hiring decision'" (citation omitted). Bulwer, 473 Mass. at 689.

2. Questions of material fact. We conclude, as did the motion judge, that Adams established a prima facie case of age discrimination. See Sullivan, 444 Mass. at 40 (plaintiff's

initial "burden is not onerous"). By all accounts, Adams was a good employee. At the time of his termination at the age of fifty-four, he was performing his job well. His statistical and expert evidence is sufficient to show that his "layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination."[21] Id. at 45. See Scarlett v. Boston, 93 Mass. App. Ct. 593, 597-599 (2018).

Adams does not seem to challenge Schneider's satisfaction of its second-stage burden, but even if he did, we conclude that Schneider met its burden to articulate a nondiscriminatory reason for terminating Adams -- either that the RIF was necessary for cost reasons or that Colby used nondiscriminatory criteria for selecting Adams and the other workers in the RIF. See Sullivan, 444 Mass. at 50-54.

Schneider's motion for summary judgment still should have been denied for two reasons.

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[21] Six of the seven employees terminated in the April 2016 RIF were over forty, and five were over fifty; and all nine employees terminated in May 2016 were forty-eight or older. All employees discharged as part of the January 2017 RIF were in the protected age category. These three RIFs conducted over a short period of time raised an inference that Schneider was targeting older employees for layoff. See Sullivan, 444 Mass. at 46 n.16, quoting Smith College v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221, 228 n.9 (1978) ("In a proper case, gross statistical disparities alone may constitute prima facie proof of a practice of discrimination").

a. The RIF was tainted. The first reason is that there is evidence from which a fact finder could find that the RIF itself was tainted even if the person who selected the employees for the RIF -- Kenneth Colby -- implemented the RIF neutrally. See Bulwer, 473 Mass. at 684. Schneider argues that the reason to conduct the RIF was nondiscriminatory (cost) rather than discriminatory (age). In fact, Adams disputed this premise and produced evidence of a pervasive and explicit corporate strategy to terminate some older workers to make room to hire younger workers. In the light most favorable to Adams, age was not treated neutrally in deciding to initiate the RIF in the first place. On this basis alone, the motion for summary judgment should have been denied. See Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 299-300 (1991) ("expression of conviction by an executive who has personnel responsibilities that 'new young blood' is needed, followed by the discharge of persons over forty and their replacement by persons under thirty, makes for powerful evidence of age discrimination, but some inferential reasoning is required to link it to the discharge of a particular person").[22]

Even if Colby were the sole decision maker for which particular employees would be included in the RIF and the

[22] Nothing in this decision should be taken as disapproval of succession planning.

innocent pawn of an undisclosed corporate strategy tainted by unlawful discriminatory animus, a rational fact finder could conclude that the RIF was unlawful. "An employer [may not] insulate its decision by interposing an intermediate level of persons in the hierarchy of decision . . . ." Bulwer, 473 Mass. at 688. "[T]he motives of the [corporate managers] should be treated as the motives for the decision." Id., quoting Trustees of Forbes Library v. Labor Relations Comm'n, 384 Mass. 559, 569-570 (1981).[23]

It is true and beside the point that many older workers survived the RIF. Adams is not arguing that the company intended to eliminate every older worker and he need not prove as much. In other words, it does not matter that a number of

[23] The United States Supreme Court also has endorsed the notion of a tainted decision that infects the decision-making process, even where the ultimate decision maker is unaware of the taint, describing it as a "'cat's paw' case." Staub v. Proctor Hosp., 562 U.S. 411, 415-416 (2011). Staub explained this theory: "The term 'cat's paw' derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Judge Posner in 1990. See Shager v. Upjohn Co., 913 F.2d 398, 405 [(7th Cir. 1990)]. In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward." Staub, supra at 416 n.1. While the Supreme Judicial Court has not used the memorable feline label, the analogy is apt.

older workers survived the RIF. Adams contends that the company used the RIF to eliminate him and several other older workers to make room to hire younger ones. Adams need only prove Schneider made progress towards its stated goal, not that it reached perfection.[24] Whether the company's design was to terminate older workers in favor of hiring younger ones is, on this record, a question of fact that a jury should resolve.

This evidence of corporate strategy against older workers cannot be dismissed as "stray remarks" by nondecision makers that are remote in time. Whether a statement demonstrating illegal animus is a discriminatory remark that is material for purposes of G. L. c. 151B, § 4, depends on the speaker and the context. Statements made by those who have power to make employment decisions -- here Sharma (the "big boss") and Arria -- are not stray remarks. See Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 667 (2000). Given the evidence of this company's continued concern about having too many older workers and stereotyped thinking about older workers ("[l]ow energy level and speed"), a reasonable fact finder could interpret these remarks as ageist and, when

[24] The net result of the January 2017 RIF was to increase the percentage of the department that was under forty by about twenty-eight percent. This is because, even though the absolute number of people under forty remained the same, the relative number increased because only those over forty were terminated.

considered with evidence of disparate treatment, would be permitted to rely on them to support a finding of discrimination. See Bulwer, 473 Mass. at 686-687.

Nor are the remarks remote in time. While many of the documents are after the date of the RIFs, they demonstrate a continuing course of conduct before and after the RIFs that reveals Schneider's thinking at the time of the January 2017 RIF. Remarks after the adverse employment action can still be relevant to the employer's contemporaneous thinking. See Brown v. Trustees of Boston Univ., 891 F.2d 337, 350 (1st Cir. 1989), cert. denied, 496 U.S. 937 (1990). See also Diaz v. Jiten Hotel Mgt., Inc., 762 F. Supp. 2d 319, 333-338 (D. Mass. 2011) (chronicling use and misuse of "stray remarks" doctrine). The remarks here are the opposite of stray remarks -- they are a window into the souls of the decision makers. See id. at 323 (it was for jury to decide whether ageist remark was "window on [a manager's] soul, a reflection of his animus, or arguably, just a slip of the tongue somehow unrelated to his 'true' feelings").

The company's ageist remarks were persistent, pervasive, and material to whether the decision to conduct an RIF was itself tainted. While the company might not yet have hired the younger workers at the time of suit, if it cleared out the older workers to set the foundation for its plan, that would be

sufficient discriminatory animus to permit a finding of liability.

b. Discriminatory selection. Summary judgment should have been denied for a second reason. A rational fact finder could find that Colby was aware of management's age animus and therefore selected workers over age fifty, including Adams, for the RIF in accordance with company policy. A fact finder also could conclude that Colby scuttled efforts of another department leader to retain Adams in some capacity.

As a general matter, evidence of corporate state of mind against older workers and in favor of early career hires is relevant to and probative of discriminatory animus. See Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987) ("evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment"). Here, Sharma directed Colby to reduce his budget by twenty percent and Colby knew that meant headcount. Moreover, Colby met with the architects of the plan, Sharma and Arria, during the time that employees were being selected for the RIF, and a rational jury could infer that the wishes of senior management were expressed in those meetings, particularly where every person Colby selected for the RIF was over fifty.

"The battle plan of the admiral is a valid datum in assessing the intentions of the captain of a single ship in the flotilla." Freeman v. Package Mach. Co., 865 F.2d 1331, 1342 (1st Cir. 1988). See Finney v. Madico, Inc., 42 Mass. App. Ct. 46, 51 (1997) ("finder of fact could conclude that the [decision maker] appointed by the Japanese corporate parent would not be deaf to the views the Japanese managers had expressed about women managers").[25]

That Colby selected eight people over age fifty is evidence that he understood the company strategy to discriminate. Adams's expert witness, Dr. Craig Moore, performed a statistical analysis of the ages of the employees in the decisional unit affected by the company's 2017 RIF. He concluded that the RIF had a disparate impact on workers fifty years of age and older. The dissent dismisses this analysis because Moore did not account for the company's stated nondiscriminatory reason for selecting Adams. This misses the point. Moore analyzed the RIF as a whole and would testify that "one could reject the hypothesis that age was not a factor in the selection of those terminated with only 9 chances in 1000 of being wrong." In Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.,

[25] Finney, 42 Mass. App. Ct. at 51, addresses the employee's prima facie case, but the reason applies equally to the third-stage pretext analysis.

474 Mass. 382, 402 n.31 (2016), the Supreme Judicial Court acknowledged the employer's challenge that the statistical analysis did not account for the reasons for individual employment decisions but noted that the interpretation of the statistical data, and the weight to be accorded it, is for the finder of fact.

Moreover, a rational jury could infer from Colby's interactions, or lack thereof, with Granato that Colby knew that his bosses wanted to clear out older workers and that Colby carried out the plan. Colby did not give Granato advance notice that Adams would be in the RIF, even though terminating Adams put Granato's group's goals in jeopardy. And when Granato approached Colby after the RIF about rehiring Adams because Granato had some budget, Colby discouraged Granato from pursuing Adams's return. Colby also directed another employee away from hiring experienced personnel.

Finally, Colby's testimony that he did not consider age in the layoff is not sufficient to defeat summary judgment. At this stage, we must disregard Colby's claim that he used only neutral criteria to select employees for the RIF. On summary judgment, a court "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000). See Lipchitz v. Raytheon Co., 434 Mass. 493, 498 (2001); Dartt

v. Browning Ferris Indus., Inc. (Mass.), 427 Mass. 1, 16 (1998). See also Bulwer, 473 Mass. at 682 n.8 (judgment notwithstanding verdict and summary judgment standards are same). Adams has created a dispute of fact sufficient to allow a rational jury to find that Colby selected Adams for layoff, and blocked his rehiring, on the basis of age.[26]

Conclusion. The company makes many persuasive arguments why a jury should render a defense verdict, but it does so by viewing the evidence in the light most favorable to the company. A jury may take the company's explanations for the RIF and the selection of Adams for the RIF at face value, but they are not required to. Adams's proffer at the summary judgment stage was sufficient to raise genuine issues of material fact whether age discrimination motivated the adverse employment action -- a question that a jury and not this court should resolve. The summary judgment in favor of Schneider is reversed and the matter is remanded to the Superior Court for further proceedings consistent with this opinion.[27]

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[26] This analysis assumes that Colby was the sole decision maker, but a finder of fact could conclude otherwise. Indeed, when others approached Sharma about retaining the very productive Adams, Sharma said no, and it is a reasonable inference that he knew Granato had some budget to do so.

[27] Adams's request for attorney's fees pursuant to G. L. c. 151B, § 9, is denied without prejudice. The request is premature as that statute allows fees to a prevailing party.

So ordered.

MEADE, J. (dissenting, with whom Singh, J., joins). The plaintiff, Mark A. Adams, a former employee of Schneider Electric USA (Schneider), appeals from summary judgment entered in favor of Schneider on his age discrimination claim. See G. L. c. 151B, § 4 (1B). Contrary to the majority's conclusion, Adams's proof was insufficient to permit a reasonable jury to infer that the nondiscriminatory reason articulated for his layoff was pretext. Accordingly, summary judgment was properly allowed, and I therefore dissent.[1]

This case is governed in all material respects by Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 39-46 (2005) (clarifying fourth element of prima facie case of discrimination in reduction in force [RIF] context).[2] Turning to the third and final stage of the analysis,[3] Schneider persuades me that no reasonable jury could find on this record that Kenneth Colby's

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[1] I note that our review was significantly hampered by the parties' noncompliance with the letter and spirit of rule 9A(b)(5) of the Rules of the Superior Court (2018). See Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 399 (2002) (describing "anti-ferreting" purpose of "rule designed to assist a trial judge in the all-too typical situation in which the parties throw a foot-high mass of undifferentiated material at the judge").

[2] It is undisputed that Adams was discharged as part of an RIF. See Sullivan, 444 Mass. at 35 n.3.

[3] The majority concedes that Schneider met its burden at the second stage of the test, i.e., that it demonstrated a nondiscriminatory reason for termination.

articulated reasons for selecting Adams for layoff were a pretext.[4] See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 683 (2016), quoting Sullivan, supra at 39 ("burden of persuasion at summary judgment remains with the defendant[], who, 'as the moving part[y], "ha[s] the burden of affirmatively demonstrating the absence of a genuine issue of material fact on every relevant issue, even if [it] would not have the burden on an issue if the case were to go to trial"'").

[4] I disagree with the majority's and Adams's understanding of the summary judgment procedure. In determining whether a genuine issue of material fact exists on this record, a reviewing court is not required to disregard all evidence favorable to Schneider, including Colby's unimpeached deposition testimony, and the documentary evidence produced from the time of the January 2017 RIF. If that were the rule, summary judgment would rarely, if ever, be available to a defendant. See Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014). See also O'Rourke v. Hunter, 446 Mass. 814, 821-822 (2006); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (establishing summary judgment standard and burdens of moving and nonmoving parties); Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) ("an adverse party may not rest upon the mere allegations or denials of his pleading"). The fact that Schneider bears the burden of persuasion at the third stage of the order of proof does not obviate Adams's burden of producing evidence of pretext. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 683 (2016). To the extent that Adams and the majority rely on Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000), to strengthen their claim of error in the summary judgment procedure, the Supreme Judicial Court has not adopted the principles of that case. Moreover, the United States Court of Appeals for the First Circuit has rejected a reading of Reeves that would preclude summary judgment where, as here, the moving party relies on the testimony of interested witnesses. See LaFrenier v. Kinirey, 550 F.3d 166, 168 (1st Cir. 2008), and cases cited.

First, Adams's statistical evidence seems to undermine the theory of his case (i.e., that Schneider did not consider employees over forty "worthy" of retention), and in any event, it fails to meet Adams's production burden on pretext at stage three. See Sullivan, 444 Mass. at 55 (statistical evidence was of "limited probative value" at stage three, and neither rebutted employer's articulated reasons for laying off plaintiff nor created reasonable inferences of discriminatory animus and causation). The average age of the members of the home and business network in the research and development (HBN R&D) team under Colby's command immediately before the RIF was 48.9; after the RIF, it remained well into the protected age group (47.1), and five employees retained by Colby in this group were over sixty-two. See id. at 49 n.25 (average age dropped by one year). Almost seventy-three percent of the retained team was over forty; and of the thirty-seven employees retained, twelve were older than Adams, and sixteen were fifty or older. Colby even elected to keep his five oldest employees, who were in their sixties.

Schneider also established to my satisfaction that the limited, expert opinion of Dr. Craig Moore is unreliable and not probative of age discrimination. See Sullivan, 444 Mass. at 46 n.16 ("The third stage [of the analysis] is the . . . appropriate stage for the employer to establish that the

plaintiff's statistical evidence is unreliable or not probative of discrimination because the statistics do not account for factors pertinent to the employer's selection process"). Not only was Dr. Moore not "asked to make any judgments regarding the relevant labor pool," but he also was expressly instructed not to determine "if the employees [were] similarly situated." This omission from his calculus is significant because the comparison of similarly situated employees is the essence of a disparate treatment claim (Adams's sole remaining claim).[5] Furthermore, Dr. Moore based his analysis on the entire HBN department, even though Colby had the authority to make layoff decisions about only some of these employees. Even if that problem should be overlooked due to Schneider's own identification of the decisional unit, other shortcomings cannot. After acknowledging that an analysis of those in the statutorily-protected category did not produce a statistically significant result, Dr. Moore selected those over age fifty as the protected category to achieve the desired result. To get there, he ignored the statutory definition of the protected class, grouped a number of protected employees (ages forty to forty-nine) with their younger, unprotected counterparts, and

[5] Dr. Moore admitted as much, earlier in his report, acknowledging that "[a]n analysis should be conducted on a population of employees that were reasonably similarly situated at the time of the personnel action."

treated them as equivalent. According to Schneider's expert, even putting aside this random methodology, the test that produced the significant result was based on those aged fifty-five and over (and not fifty as represented by Dr. Moore); and Dr. Moore's numbers do not back up his reported result. Most problematic for Adams's present purposes, Dr. Moore only considered age as a factor in Adams's discharge. If he had considered other potential factors that might have influenced Colby's selections, such as job function, all statistical significance disappeared. Where Dr. Moore failed to consider or eliminate other possible nondiscriminatory factors for the layoff decisions, which could explain the disparity, his statistical analysis was not probative of discrimination, and it was thus inadequate to meet Adams's production burden on pretext.[6] See Sullivan, 444 Mass. at 55-56. Nothing in Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382 (2016), which did not involve a challenge to an expert opinion, changes the result. See id. at 401-402 & n.31 (despite small sample size, plaintiff could rely on statistics to show firm's failure to retain women in her section;

[6] Dr. Moore prepared his report before Colby was deposed. Adams had plenty of time to obtain an updated statistical report from Dr. Moore, comporting with Sullivan's teachings, but chose not to do so.

nondiscriminatory explanations for women leaving firm presented jury question).

Adams also claims that he met his burden pertaining to pretext by producing twenty-five documents (hereinafter, documents) demonstrating that Schneider considered age as a "negative factor[,] evidencing a plan to push out older workers to make room for younger [employees]." I disagree.

The statements, remarks, and phrases in these documents, culled from over 9,000 pages of discovery materials, are remote in time, are made by employees outside of HBN R&D or by nondecision makers, are ambiguous as to age-based animus, or are unrelated to the January 2017 RIF decisional process. Many are taken completely out of context. Accordingly, they do not qualify as direct evidence of discrimination, and they are not probative of pretext. See Somers v. Converged Access, Inc., 454 Mass. 582, 597 (2009); Sullivan, 444 Mass. at 49 n.24 (ageist statements made by decision maker to another discharged employee did not permit inference that plaintiff was terminated because of her age); Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 667 (2000) ("Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself" are not "direct or strong evidence that proscribed criteria played a motivating

part in an employment decision"). Colby, the putative decision maker, was questioned extensively at his deposition about the statements in these documents. Colby testified that he had no knowledge of, nor did he recall, most of them. Moreover, almost all of the documents postdated the January 2017 RIF. In fact, some of the would-be "smoking gun" documents were authored by Bin Lu, who was not yet employed by Schneider at the time Colby made the decisions. Thus, any statements in these documents could not have had a material "impact" on Colby's decision-making.

Although the majority concludes that a jury would be free to summarily disbelieve Colby's testimony that he was the sole decision maker, Adams produced no proof from which a reasonable jury could find that there were other decision makers who harbored discriminatory animus involved in Adams's layoff.[7] A

[7] To the extent that the majority takes issue with the "stray remarks" doctrine, it is firmly embedded in Massachusetts law; it should be for the Supreme Judicial Court, not this court, to retire it. See, e.g., Sullivan, 444 Mass. at 49 n.24; Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 447 (1995); Fontaine v. Ebtec Corp., 415 Mass. 309, 314 n.7 (1993); Charles v. Leo, 96 Mass. App. Ct. 326, 339-340 (2019); Brownlie v. Kanzaki Specialty Papers, Inc., 44 Mass. App. Ct. 408, 414 (1998); Finney v. Madico, Inc., 42 Mass. App. Ct. 46, 50-51 (1997); Tardanico v. Aetna Life & Cas. Co., 41 Mass. App. Ct. 443, 450 (1996). See also Zampierollo-Rheinfeldt v. Ingersoll-Rand de Puerto Rico, Inc., 999 F.3d 37, 52 (1st Cir. 2021); Murray v. Warren Pumps, LLC, 821 F.3d 77, 87 (1st Cir. 2016).

potential disbelief in Colby's testimony is not a "specific fact" for purposes of Mass. R. Civ. P. 56, 365 Mass. 824 (1974). See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Cf. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) (without offering any concrete evidence from which reasonable juror could return verdict in plaintiff's favor, plaintiff could not defeat summary judgment by merely asserting that the jury could disbelieve the defendant's denial of wrongdoing); Mass. R. Civ. P. 56 (e) (response of party opposing summary judgment motion must "set forth specific facts showing that there is a genuine issue for trial").

To the extent that Adams maintains that individuals involved in human resources (HR), Michelle Gautreau and Amanda Arria, were the real decision makers here, the claim is not supported by the record.[8] Colby testified in detail about his decisional process as he pondered his selections for the layoff list. That process included first terminating all the contractors working in HBN R&D; then creating a spreadsheet to organize the data and to rank the employees for possible termination, identifying experts in areas "100% tied to a key

[8] Adams explained that Gautreau, the director of HR, made the decision after clearing it with Arria, the vice-president of HR, "[b]ecause that's how the chain of command works at every company." HR also sent Adams the termination letter.

project" and removing them from consideration; and finally grouping employees by function to compare them to retain the most critical.[9] Colby expressly testified that no one either directed him in his choices or instructed him to select Adams; that he neither factored in age, nor was told to do so;[10] and that he picked Adams for layoff because Adams spent most of his time working for other subdivisions, such that his loss would

[9] Colby prepared a spreadsheet listing factors such as "pros," "cons," "impact," and salaries. Under Adams's "cons," Colby wrote, among other things, that he "does not care for standard [R&D] work." According to Colby, Adams "really enjoyed" field quality work but did not enjoy the work assigned to him for the restricted other hazardous substances project, which accounted for twenty-five percent of his time.

[10] Asked whether he ever became aware that the senior leadership of the Boston One Campus was concerned about the age of the employees, Colby responded, "No, not the age. They [were] not concerned about the age. . . . [W]e wanted to make sure we had a good succession plan, because we have a lot of very knowledgeable experienced people. . . . [S]ome of them were getting close to retirement, and we wanted to make sure that we had people that they could transfer the knowledge to." Colby denied being asked to give hiring preference to younger individuals. However, Colby did admit that after Lu joined the company, which was after the January 2017 RIF, management was trying to expand HBN R&D employees' knowledge with some new emerging technologies. To that end, he was asked to look for engineers from the top graduate programs who possessed these specific skill sets. While Schneider recruited globally at many schools, because of HBN's small size and limited positions, HBN partnered with only one, Virginia Tech University, a graduate level program, which would have students of all ages. To the extent that Adams argues that Schneider exhibited stereotypical thinking by hiring early career employees, instead of training its older workers, the unrebutted evidence demonstrates that Schneider sent its employees to Virginia Tech University's laboratories to be trained on cutting edge technology skills.

have less of an impact on projects for which Colby was responsible. As is true at any corporation, Schneider's HR department assists and supports business leaders with employment decisions, but has no authority to make independent personnel decisions. Arria had to sign off on the final selections, but Adams has produced no evidence that she participated in the selection process.

Pankaj Sharma, the senior vice-president of HBN, was in a position to influence Colby's decision-making. However, Colby claimed he made his decisions alone, and he denied meeting with Sharma until after he made his independent selections. Sharma worked in Singapore, while Colby worked in Massachusetts, and thus, chance encounters were unlikely. Adams also did not produce any countervailing proof of any interactions or conversations between Colby and Sharma from which improper manipulation or influence by Sharma could be inferred.[11] Cf. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (denying summary judgment for employer where

[11] The evidence of record was that Colby met with Arria, Sharma, and others to go over his final selections; Sharma and Arria signed off on his recommendations. The majority's statement that the wishes of senior management (to get rid of the older employees) were expressed in these meetings is not a fair inference, but rather is mere speculation. Adams presented no evidence that Sharma and Arria were the "architects" of any master plan.

general manager who made discriminatory comments held "almost daily conference calls" with decision maker and was asked for opinion about plaintiff's dismissal, and there was evidence that general manager was involved in decision). Adams also produced no evidence that any other senior leader attempted to manipulate or influence Colby's decisions. Kabai, Colby's peer, knew about the layoff ahead of time and did not try to convince Colby to take Adams off the list. The company's upper management, including Sharma's boss, David Johnson, the executive vice-president of the information technology division (ITD) globally, and Jean Pascal-Tricoire, Schneider's chief executive officer, are mentioned only in passing in the record.[12] In fact, there was no evidence that they were involved in any way in the RIFs. As noted above, Lu, whose discriminatory statements are relied on in abundance, was not even at the company at the time of Adams's layoff. Nor is there any evidence of record that Colby relied on either "information [provided by others] that [was] inaccurate, misleading, or incomplete," Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 83 (1st Cir. 2004), or the recommendation of any superior "whose motives have been impugned" (citation omitted). Bulwer, 473 Mass. at 688. In sum, Adams's proof is insufficient to support his theory that

[12] Either Sharma was not deposed, or his testimony is not included in the summary judgment record.

Colby acted as an innocent pawn, or the "cat," of senior management. See Brandt v. Fitzpatrick, 957 F.3d 67, 79 (1st Cir. 2020) ("an employer can be held liable when a decision-making official . . . relies on false 'information that is manipulated by another employee who harbors illegitimate animus' to take an adverse employment action" [citation omitted]). See also Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) ("A 'cat's paw' is a 'dupe' who is 'used by another to accomplish his purposes'" [citation omitted]).

Furthermore, a fact finder would not be permitted to find, as the majority maintains, that Colby was in cahoots with "upper management" to shed older employees and replace them with younger talent. Indeed, Adams admitted that Colby took steps to prevent having to terminate his employment. Adams admitted that Colby twice approached Kabai to determine if Kabai could place Adams on his team in field quality engineering, Adams's preferred work department.[13] Given these admissions, I am

[13] In fact, several individuals, including Colby, approached Kabai to inquire about Adams transferring to field quality engineering; Kabai investigated, but was unable to accommodate Adams due to budget constraints. Christopher Granato, who first learned of Adams's layoff upon a return from a business trip in February 2017, had funds available for a temporary contractor position, and was interested in bringing back Adams. These facts are summarily ignored by the majority based on its conclusion that a jury would not be required to credit them. See ante at note 9. Again, a potential for juror disbelief is not a substitute for proof that there were other decision makers

satisfied that no reasonable jury could find that a month or two after trying to place Adams with Kabai, Colby then would turn around and intentionally fail to inform Christopher Granato in advance that Adams would be part of the RIF, and thereafter "thwarted" Granato's attempts to bring back Adams. A finding that Colby, who kept his five oldest employees in January 2017, took these actions in order to reduce the number of older workers requires an even bigger, unwarranted stretch of logic. Moreover, after the RIF, Colby did not fill Adams's position in HBN R&D with another employee, and his position was not backfilled. Adams's extra-department, battery initiative work was distributed to Fred Rodenhiser, Adams's former manager, as well as to two employees of unknown ages hired in the Philippines to work with the large team assembled there, which was already performing this type of work.[14]

Adams next claims that Schneider's alleged budgetary problems that triggered both the 2016 and 2017 RIFs, and his termination, were a pretext. The factual basis for this argument is not supported by the record. There was substantial

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who harbored discriminatory animus in effectuating Adams's layoff.

[14] Rodenheiser testified that he took over part of Adams's work, and the rest was either "spread throughout the company," or was "not getting done."

evidence of the need for cost cutting, and unrebutted testimony that layoffs in HBN R&D were necessary to reach the budget goals. Colby's subsequent hiring of a few recent graduates with specialized skills, using funding made available by a couple of resignations, would not permit a reasonable jury to find that the budgetary reasons were a pretext.

It is true that the documents show that the age and, to a lesser extent, the gender of Schneider's workforce were frequently discussed and analyzed by management.[15] Schneider admitted that it had what are variously referred to as "age diversity" or "diversity" policies.[16] Given the reality of labor

[15] For example, in an October 28, 2015, e-mail ITD vice-president Colin Campbell expressed a need for "age diversity" in the Boston office. Campbell also stated that the leader of the "embedded system team" recognized the issue "and has been stocking his team with young talent." In an e-mail of the same date, an internal recruiter stated, "[T]here is no down side to hiring a qualified young engineer." In an e-mail dated March 23, 2016, Arria wrote that she had "sent a love note off last night asking if we can continue college hiring . . . would hate for us to stop this, especially as a female diversity feeder group stay tuned . . . ." As Adams notes, there are many more similar statements.

[16] In his April 20, 2017 presentation, senior vice-president of HR for ITD, Jiri Cermak, expressed Schneider's goal to "[d]evelop diversity (gender, nationalities, but not only . . . 'get the knowledge of the world'"). Colby testified that "the technical world" had a "disproportionate number of males compared to females . . . and so [they] really push[ed] to try to hire, whenever possible, talented females." Arria further indicated that both as a global company and within HBN, they worked "really hard" to achieve a diverse workforce, "whether that's age, gender, ethnicity, skills, [or] location." They did so because research shows that diverse teams are more high

demographics and the lack of diversity at Schneider, the talk of age and gender was hardly surprising.[17] During this time period, Schneider, like many science, technology, engineering, and math companies, found itself with an aging, male work force. Adams, along with Colby and other members of HBN R&D, had worked together dating back to the 1990s at the American Power Conversion Corporation, a company acquired by Schneider in 2007. When the challenged RIF commenced, many of the employees in the HBN R&D department were at, or approaching, retirement age. These employees possessed a wealth of valuable knowledge and information gained from years of experience. If Schneider failed to bring in new employees to transfer knowledge, it risked losing it forever, as its employees retired. Succession planning for "junior talent" and the next generation of workers was not only important for the viability of HBN R&D, but also critical. The alleged "realities of the modern workplace" are

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performing and provide a competitive advantage. I note that Schneider's diversity initiative furthered the underlying purposes of c. 151B.

[17] Schneider was encountering difficulties hiring qualified female candidates. In an e-mail dated August 28, 2017, to William Manning, an HBN vice-president, Sharma expressed dissatisfaction with a male candidate he had interviewed, and Sharma asked whether they could "look at more candidates, younger, women." In response, Manning indicated that although he had encouraged recruiters to give diversity (which he defined as "younger, women") "priority" for a certain position, no female candidates with the necessary experience had applied.

not a substitute for proof of pretext. In short, the diversity policies and succession planning reflected in these documents were consistent with legitimate business objectives and, standing alone, do not permit an inference of pretext.

It is true that terminating employees over the age of forty in order to clear the decks for young talent would constitute age discrimination. However, no reasonable jury could find that is what transpired here. Even if the documents evince discriminatory animus, and a corporate strategy to create space for young workers, there is insufficient evidence that any such nefarious plan was actually implemented in January 2017, or any time thereafter. The HBN R&D department headed by Colby was old before the RIFs in April and May 2016 and January 2017. It remained old at the end of the RIFs. The early retirement and broader ITD-wide college recruiting programs proposed by HR to bring in "fresh talent" never materialized. Long after the three layoffs, these older employees continued to draw their higher salaries, and the number of employees in HBN R&D remained static. In fact, in January 2018, the latest date for which statistics are available, the demographics of HBN R&D looked the same as they did right after the January 2017 layoff: thirty-six employees, twenty-six of whom were over forty (sixteen were over fifty, and only five employees were under thirty).

As Adams points out, despite the over-all hiring freeze, exceptions were made, and Schneider continued to recruit from specific colleges and universities in 2016 and 2017. The hiring process can take months and years, and the talent pool is limited. An employer should be able to continue established recruitment programs without running afoul of the antidiscrimination laws. Moreover, although Colby engaged in college recruiting in 2017, there is not a shred of evidence that Colby hired younger workers in the space opened by the RIFs.[18] In the years following Adams's termination, the only two hires Colby made filled positions opened when two employees resigned to take positions at other companies. The majority recognizes this hole in Adams's case; its suggestion that simply clearing out the older workers and "set[ting] the foundation for its plan . . . would be sufficient discriminatory animus" for liability rings hollow. Ante at . Liability under c. 151B requires more than discriminatory animus.

The context of the January 2017 layoff here is very unusual for a discrimination case: Adams not only knew the putative decision maker, but he was also long-term friends with him. As Adams admitted, Colby harbored no discriminatory animus against

[18] The ambiguous "[d]eeper cuts for college grads" statement referenced by the majority, ante at note 13, was explained by its author, Gautreau, to mean "[p]robably reduce what we're doing in terms of college recruiting."

him. He also does not challenge the "con" attributed to him by Colby that led to his layoff: he admittedly wanted little or nothing to do with the work of HBN R&D, making him an obvious choice for the layoff list. Because Adams's proof was insufficient to permit a reasonable jury to infer that the nondiscriminatory reason articulated for his layoff was a pretext, summary judgment was properly allowed.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 21-P-158

MARK A. ADAMS

vs.

SCHNEIDER ELECTRIC USA.

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

The summary judgment is reversed and the matter is remanded for further proceedings consistent with the opinion of the Appeals Court.

By the Court,

Joseph F. Stanton, Clerk

Date August 17, 2022.

93 Mass.App.Ct. 1118
Unpublished Disposition

Appeals Court of Massachusetts.

Richard A. CAMPOS

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

17–P–1146
|
Entered: July 5, 2018

By the Court (Trainor, Ditkoff & Wendlandt, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiff, Richard A. Campos, appeals from a Superior Court order allowing the Massachusetts Bay Transportation Authority's (MBTA's) motion for summary judgment on his complaint, alleging that the MBTA discriminated against him on the basis of his race and color in violation of G. L. c. 151B, § 4, when it placed him on administrative leave for approximately six months and suspended him for ten days.[2] We affirm.

Background. We briefly summarize the material facts in the light most favorable to the plaintiff, the nonmoving party, reserving additional facts for later discussion. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 35 (2005). The plaintiff, who is of Hispanic descent, joined the MBTA police department (the department) as a patrol officer in 1996, rose through the ranks, and eventually became a lieutenant in 2008 after receiving the highest score on the promotional examination.[2]

While working as a lieutenant for the department, the plaintiff supplemented his income by working police detail assignments (details), which consist of work outside of an officer's normal duties often paid by the third party for whom the work is being done. To get paid for a detail, an officer must submit both (i) a hard copy detail card, attesting to the start and finish times of the detail as well as the actual hours worked, and (ii) a computerized version of this same information in the department's assignment tracking system (Larimore System). One such detail at the Ruggles MBTA station (Ruggles detail) is paid by Northeastern University police department (Northeastern).

In early March, 2013, Northeastern contacted the department to complain that it had been charged for a February 15, 2013, Ruggles detail when no department officer had worked the detail; instead, a Northeastern officer had performed the detail. Although the plaintiff had not worked the detail, the Larimore System listed the plaintiff as having worked this detail, and the plaintiff had submitted a signed detail card, confirming that he had worked that detail. In response to Northeastern's complaint,

Robert Fitzsimmons, the deputy chief in charge of the department's internal affairs unit, commenced an investigation of the plaintiff's detail assignments.

During the investigation, the plaintiff admitted that he had not worked the February 15 detail. He explained that, on the evening of the detail, he had asked another department lieutenant to remove him from the Larimore System and to contact Northeastern to confirm the removal. The plaintiff left for a one-week vacation the next day, and when he returned, he submitted several detail cards for payment. When he checked the Larimore System, he saw that the February 15 detail was still listed as his assignment, and mistakenly submitted for payment of the detail, forgetting that he had not actually worked that evening.

***2** In addition to the February, 2013, Ruggles detail, Fitzsimmons discovered that the plaintiff had worked two overlapping detail assignments in separate locations in December, 2012, and had received double payment for the time.[4] Fitzsimmons reported the status of his investigation to the department chief, Paul MacMillan, who placed the plaintiff on paid administrative leave pending the completion of the investigation.[5] As a result, although the plaintiff was paid his full salary, he was no longer eligible to supplement his pay by working details.

In view of the February, 2013, and the December, 2012, incidents, Fitzsimmons expanded his investigation of the plaintiff's detail assignments, finding eleven other instances when, according to "Fast Pass" transponder records, the plaintiff's vehicle was on the road during times where his detail submissions reported that he was still at the Ruggles detail.

In June, 2013, Fitzsimmons issued a written report to the chief, concluding that the plaintiff had, among other things, acted with fraudulent and larcenous intent by submitting for and receiving payment for details when he knew he was not present, and violated the department rules prohibiting officers from violating criminal laws. Although Fitzsimmons had received the plaintiff's explanation for the February 15 Ruggles detail, he did not ask the plaintiff to explain either the December, 2012, violation or the eleven other instances of discrepancies regarding the plaintiff's Ruggles details.

After reviewing the report, the chief convened a disciplinary hearing (just cause hearing), at which the plaintiff was represented by counsel. Fitzsimmons testified regarding his investigation. The plaintiff had the opportunity to testify and present evidence, but chose not to do so. In particular, the plaintiff offered no explanation for either the December, 2012, violation or for the eleven instances where he left the Ruggles detail early but was paid for the full time period.

The hearing officer concluded that the plaintiff had knowingly submitted false claims for payment in connection with the eleven occasions where he left the Ruggles detail early, and for the December, 2012, overlapping shifts, but that he did not knowingly make false time submissions in connection with the February 15, 2013, Ruggles detail. The chief reviewed these conclusions, and determined that the plaintiff had committed serious misconduct. After negotiations with plaintiff's counsel, the chief suspended the plaintiff for ten days without pay.

Discussion. We review a ruling on a motion for summary judgment de novo to determine whether the moving party has established that, viewing the evidence in the light most favorable to the opposing party, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[6] Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016), quoting from Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 474 (2013). See Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002). To survive summary judgment on a claim of employment discrimination pursuant to G. L. c. 151B, a plaintiff-employee must produce evidence from which a reasonable jury could infer "four elements: membership in a protected class, harm, discriminatory animus, and causation." Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 396 (2016). Because there is rarely direct evidence of discriminatory animus, a plaintiff may establish these elements by producing "indirect or circumstantial evidence using the familiar three-stage, burden-shifting paradigm" first set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–805 (1973).[7] Bulwer, supra at 680–681.

***3** At the first stage, the plaintiff must produce evidence of a prima facie case of discrimination—that is, evidence that would allow a reasonable jury to infer that the plaintiff: (i) is a member of protected class; (ii) performed the job adequately; and (iii) suffered an adverse employment action. Ibid. Here, we assume without deciding that the plaintiff's evidence supports a prima facie case. In the second stage, the burden of production shifts to the employer to articulate a nondiscriminatory rationale for the adverse employment decision. Ibid. The MBTA has articulated a legitimate, nondiscriminatory reason for the adverse employment action—namely, that (as set forth supra) he violated the department policies by submitting for and receiving payment for work that he did not perform.

In the third stage, the burden shifts back to the employee to produce evidence that would allow a reasonable jury to infer that the employer's stated rationale was not the actual reason, and as such, was pretext. Ibid. As supposed evidence of pretext, the plaintiff points to Fitzsimmons's failure to interview the plaintiff (beyond seeking his explanation for the February, 2013, Ruggles detail) and others regarding the numerous alleged policy violations. However, an incomplete or cursory investigation is not a basis for a finding of pretext. See Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 128, 134 (1997). Moreover, the Fitzsimmons investigation was not the end of the MBTA's efforts to investigate the plaintiff's misconduct. To the contrary, the plaintiff was given a full opportunity to provide exculpatory information during the just cause hearing, was represented by counsel, and affirmatively chose not to explain his detail assignment submissions.[8] Any purported failure on Fitzsimmons's part to proactively seek clarification from the plaintiff—information the plaintiff failed to provide when given the chance—is not evidence that the MBTA's rationale was a pretext.

The plaintiff also alleges that pretext can be found on the basis of the supposed disparate treatment of the plaintiff in comparison to a white officer. The white officer here was not similarly situated to the plaintiff. See id. at 130–133. This officer, unlike the plaintiff, neither made false representations nor double billed a third party regarding detail assignments. Furthermore, the white officer was disciplined by a different supervisor than the plaintiff. See Rodriguez–Cuervos v. Wal–Mart Stores, Inc., 181 F.3d 15, 21 (1st. Cir. 1999). In these circumstances, the treatment of the white officer was not evidence that the MBTA's rationale regarding the plaintiff's discipline was pretext.[9]

Finally, the plaintiff argues that pretext can be inferred based on historic instances of the MBTA's treatment towards him prior to the investigation at issue in this case. We disagree in light of the time span between the plaintiff's placement on administrative leave and these prior events, and the fact that those events involved entirely different factual contexts and concerned decisions made by MBTA employees not involved in the current allegations. See Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 439 (1st Cir. 1997) (time-barred conduct considered only if "legally relevant" to the conduct about which the employee timely complains).

***4** Judgment affirmed.

All Citations

93 Mass.App.Ct. 1118, 107 N.E.3d 1254 (Table), 2018 WL 3287762, 2018 Fair Empl.Prac.Cas. (BNA) 237,988

Footnotes

1 The panelists are listed in order of seniority.

2 The motion judge also ordered the entry of summary judgment on the plaintiff's employment retaliation claim pursuant to G. L. c. 151B, § 4(4). As the plaintiff raises no challenges to that portion of the motion judge's order, the issue is waived. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 35 n.1 (2005).

3 At the time, he was the highest ranking Hispanic officer in the department.

4 This is referred to as a "double dipping" violation.

5 The chief stated that placing officers under investigation on paid administrative leave is a standard department procedure.

6 The plaintiff's argument, citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000), that, at summary judgment, the judge cannot consider the movant's undisputed evidence is directly contradicted by well-established Massachusetts precedent. See Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014) (citations omitted). Indeed, Federal courts of appeals addressing a similar argument have soundly rejected it. LaFrenier v. Kinirey, 550 F.3d 166, 168–169 (1st Cir. 2008) (citing cases from the United States Court of Appeals for the First, Third, Fourth, and Sixth Circuits).

7 The Supreme Judicial Court has previously considered and rejected the plaintiff's argument that in addressing a motion for summary judgment in a discrimination case courts should proceed directly to the third stage of the McDonnell Douglas paradigm. Sullivan, 444 Mass. at 46 n.17 ("We proceed with the McDonnell Douglas analysis because it remains 'a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination' "), quoting from Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

8 The plaintiff's belated explanations have no bearing on what the chief believed when he made his decision to place the plaintiff on paid administrative leave and (following Fitzsimmons's investigation, the just cause hearing, and negotiation with the plaintiff's counsel) to suspend the plaintiff. As such, the plaintiff cannot rely on these explanations to show pretext. Sullivan, 444 Mass. at 56 (explaining that "our task is not to evaluate the soundness of [the defendant's] decision making, but to ensure it does not mask discriminatory animus").

9 The plaintiff's argument that the issue whether comparators are similarly situated is always a question for the jury is belied by the case law. See, e.g., Matthews, 426 Mass. at 130–133.

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CERTIFICATE OF COMPLIANCE
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Lynn A. Kappelman, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents);
Mass. R. A. P. 21 (redaction); and
Mass. R. A. P. 27.1 (further appellate review).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 1,992, total non-excluded words as counted using the word count feature of Microsoft Word 2013.

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Dated: September 7, 2022

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on September 7, 2022, I have made service of this Application for Further Appellate Review upon the attorney of record for each party, by the Electronic Filing System on:

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